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No. 89-260

Supreme Court, U.S.

FILED

MAR 2 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1989

THE STATE OF IDAHO,

Petitioner,

vs.

LAURA LEE WRIGHT,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Idaho

JOINT APPENDIX

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Petition for Certiorari Filed August 11, 1989
Certiorari Granted January 16, 1990

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The following opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the Idaho Supreme Court in *State v. Wright*, dated June 13, 1989, now found at 116 Idaho 382, 775 P.2d 1224 (1989)..... A1

Opinion of the Idaho Supreme Court in *State v. Giles*, dated March 30, 1989, now found at 115 Idaho 984, 772 P.2d 191 (1989)..... A23

DOCKET ENTRIES

November 28, 1986	Prosecuting Attorney's Information filed
April 30, 1987	State's Motion in Limine and Memorandum in Support
May 6,7,8,11, 1987	Jury trial
May 11, 1987	Jury verdict returned
June 1, 1987	Sentencing hearing
June 3, 1987	Judgment of Conviction and Sentence
July 6, 1987	Notice of Appeal filed
June 13, 1989	Decision of the Idaho Supreme Court

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Filed
 NOV 28 1986

IN THE DISTRICT COURT OF THE FOURTH
 JUDICIAL DISTRICT OF THE STATE OF
 IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)	
Plaintiff,)	
	)	INFORMATION
-vs-	)	14013
LAURA LEE WRIGHT)	
ROBERT LOUIS GILES)	
Defendant [sic].)	

GREG H. BOWER, Prosecuting Attorney in and for the County of Ada, State of Idaho, who in the name and by the authority of the State, prosecutes in its behalf, comes now into District Court of the County of Ada, State of Idaho and states that LAURA LEE WRIGHT and ROBERT LOUIS GILES are accused by this Information of the crimes of: LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, FELONY, I.C. 18-1508, TWO COUNTS which crimes was [sic] committed as follows:

COUNT I

That the defendants, LAURA LEE WRIGHT and ROBERT LOUIS GILES, on or between March 1986, and October 1986, in the County of Ada, State of Idaho did wilfully and lewdly, commit multiple lewd and lascivious acts upon the body of a minor, Jeannie May Wright, under the age of sixteen years, to-wit: of the age of five

(5) years, in that Laura Lee Wright held the child down while defendant Robert Louis Giles had sexual intercourse with the minor child, with the intent to gratify the sexual desire of the defendants or the minor child.

COUNT II

That the defendants, LAURA LEE WRIGHT and ROBERT LOUIS GILES, on or between March 1986, and November 8, 1986, in the County of Ada, State of Idaho did wilfully and lewdly, commit a lewd and lascivious act upon the body of a minor, Kathy L. Wright, under the age of sixteen years, to-wit: of the age of two (2) years, in that Laura Lee Wright held the child down while defendant Robert Louis Giles had sexual intercourse with the minor child, with the intent to gratify the sexual desire of the defendants or the minor child.

All of which is contrary to the form, force and effect of the statute in such case and against the peace and dignity of the State of Idaho.

/s/ Greg H. Bower
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 Attorney

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Filed
APR 30 1987

IN THE DISTRICT COURT OF THE FOURTH
JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,)	
Plaintiff,	)	Cr. 14013
	)	STATE'S
-vs-	)	MOTION
LAURA WRIGHT	)	IN LIMINE AND
ROBERT GILES	)	MEMORANDUM
Defendant [sic].	)	IN SUPPORT

THE STATE moves this Honorable Court to admit into evidence at trial the hearsay statements made by the two alleged infant victims in this case, Jeannie Wright and Kathy Wright. In support of the State's motion for the admissibility of these otherwise inadmissible hearsay statements, the State cites Idaho Code § 19-3024. That statute allows the admission of statements made by a child under the age of ten years describing any act of sexual abuse after a proper foundation has been laid.

Subsection (1) specifically requires that the court find "in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statements provide sufficient indicia of reliability." This requirement would be satisfied where the State makes an offer of proof for the statements made by the infant. This would include who was present, where the statements took place, the circumstances under which the statements

were elicited, and the general content of the anticipated testimony by the witness who heard the statements. This offer of proof would be presented prior to any testified hearsay statement.

Subsection (2) sets forth the second prong required by Section 19-3024. "The child either testifies at the proceedings, or is unavailable as a witness." If the child testifies at the trial, the hearsay statements found reliable by the court under Section 19-3024(1) would be admissible.

If the child does not testify at the proceeding, the hearsay statements may still be admissible under subsection b. If it is determined that the witness is unavailable and corroborative evidence of the act is provided such statements may be admitted. "A child is unavailable as a witness when the child is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." In determining whether a witness is unavailable, Idaho Code Section 9-202 is applicable in criminal proceedings pursuant to Idaho Code 19-3001. That section excludes certain persons from testifying as witnesses. Subsection (1) excludes those persons of an unsound mind. Subsection (2) excludes children under the age of ten years "who appear incapable of receiving just impressions of the facts respecting which they are examined, or relating them truly." This section seems to parallel Section 19-3024(2)(b).

A close reading of Subsection (2)(b) can find a parallel intention of the legislature with Section 9-202. In the

unavailability language of 19-3024, a child is unavailable if the child is unable to (1) be present, or (2) to testify at the hearing. That section continues by excluding those unable to be present because of death or then existing physical or mental illness or infirmity. Section 9-202(1) excludes persons of unsound mind. That would seem to encompass the "mental illness" exclusion of 19-3024(b). The remaining language of Subsection (2)(b) includes, death or an existing physical illness or infirmity. Death or existing physical illness would be such cases where the physical presence of the child would be impossible. Finally, the term "infirmity" seems to parallel subsection 9-202(2) where the "incapacity" of certain children to testify is outlined.

The term "infirmity" in *Blacks [sic] Law Dictionary* outlines physical condition and health that would affect and [sic] applicants [sic] success in obtaining an insurance policy. The definition then refers the reader to the word "incapacity." Considering that same volume under the word "incapacity," legal incapacity is defined, "this expression implies that the person in view has the right vested in him, but is prevented by some impediment from exercising; as in the case of minor [sic], committed persons, prisoners, etc." Synonyms outlined in the definition include "want of capacity; inefficiency; and incompetency."

It is the State's position that the legislature in enacting Section 19-3024(2)(b) intended to allow hearsay statements where the child would be unable to testify. A reasonable interpretation of that statute would be that a child who has died, who is physically incapable of being present at the proceedings, or is mentally ill and excluded under Section 9-202, or (infirm) incapable of testifying as

outlined in Section 9-202(2) all would be "unavailable" to testify.

The intention of the exception to hearsay as outlined by Section 19-3024, would be to screen hearsay statements made by children under the age of ten for their reliability as Subsection (1) outlines. The second prong of this section then requires that the child testify at the proceedings allowing cross-examination. Obviously the legislature intended the jury to be afforded the opportunity to judge the demeanor and credibility of the child witness on the stand and to determine the weight to be given the hearsay statements admitted.

However, if the child is unavailable and does not testify as a witness, then the statute requires corroborative evidence of the act. Clearly, a witness excluded specifically by Section 9-202 would also be unavailable under Section 19-3024(2)(b). It would be necessary therefore, that the court under the guidelines of Section 9-202, conducts a hearing in chambers to determine whether the child qualifies as a witness.

The Idaho Supreme Court has given the following test for determining the competency of young persons to testify:

"the true test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; (5) the capacity to

understand simple questions about it." See *State v. McKenney*, 101 Id. 149 at 150 (1980).

Simply put, it must first be shown that the child recognizes the duty to tell the truth. Then second, that the child has the capacity to observe, to remember and to relate. And finally, that the child has the capacity to understand simple questions about the occurrence testified to.

If this court determines either child witness to be incompetent under I.C. § 9-202, then that child would be unavailable to testify. Therefore, pursuant to § 19-3024(2)(B) her hearsay statements would then be admissible evidence.

Finally, the State here submits that such hearsay statements made by the witness who will testify are admissible prior to that infant witness testifying.

DATED This 29th day of April, 1987.

GREG H. BOWER
Ada County Prosecuting Attorney

/s/ K Naylor
By: KIRTLAN G. NAYLOR
Deputy Prosecuting Attorney

IN THE DISTRICT COURT OF THE FOURTH
JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF ADA

Filed
MAY 12 1987

THE STATE OF IDAHO,)	
)	
Plaintiff,	)	Criminal Case
	)	No. 14013
vs.	)	VERDICT
LAURA LEE WRIGHT,	)	COUNT I
)	
Defendant.)	
_____)	

WE, The Jury, sworn to try the above-entitled matter, find the defendant, Laura Lee Wright, guilty of Count I, Lewd Conduct With a Minor Under Sixteen.

Dated this 12 day of May, 1987.

/s/ Walter Mott
FOREMAN

WE, The Jury, sworn to try the above-entitled matter, find the defendant, Laura Lee Wright, guilty of the lesser included offense of Count I of Sexual Abuse of a Child Under the Age of Sixteen Years.

Dated this ___ day of ___, 1987.

FOREMAN

WE, The Jury, sworn to try the above-entitled matter,
find the defendant, Laura Lee Wright, guilty of the lesser
included offense of Count I of Battery.

Dated this ____ day of ___, 1987.

FOREMAN

IN THE DISTRICT COURT OF THE FOURTH
JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF ADA

Filed
MAY 12 1987

THE STATE OF IDAHO,)	
)	
Plaintiff,	)	Criminal Case
	)	No. 14013
vs.	)	VERDICT
	)	COUNT II
LAURA LEE WRIGHT,)	
)	
Defendant.)	
_____)	

WE, The Jury, sworn to try the above-entitled matter,
find the defendant, Laura Lee Wright, guilty of Count II,
Lewd Conduct With a Minor Under Sixteen.

Dated this 12 day of May, 1987.

/s/ Walter Mott
FOREMAN

WE, The Jury, sworn to try the above-entitled matter,
find the defendant, Laura Lee Wright, guilty of the lesser
included offense of Count II of Sexual Abuse of a Child
Under the Age of Sixteen Years.

Dated this ____ day of ___, 1987.

FOREMAN

WE, The Jury, sworn to try the above-entitled matter, find the defendant, Laura Lee Wright, guilty of the lesser included offense of Count II of Battery.

Dated this ____ day of ___, 1987.

FOREMAN

IN THE DISTRICT COURT OF THE FOURTH
JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF ADA

Filed
JUN 5 1987

THE STATE OF IDAHO,)	
)	
Plaintiff,	)	CASE NO. 14013
vs.	)	JUDGMENT OF
LAURA LEE WRIGHT,	)	CONVICTION
	)	AND SENTENCE
Defendant.)	
_____)	

The above-named matter came before the Court for sentencing June 1, 1987. The defendant appeared in person and with her attorney Lansing Hanes [sic]. The State was represented by Kirtlyn [sic] Naylor as prosecuting attorney. The record reflects the following:

An information was filed on November 28, 1986, charging the defendant with the crime of LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, FELONY, I.C. 18-1508. Arraignment was held on December 12, 1986, at which time the defendant appeared in person and with counsel and was advised of the charge and the possible penalties and was further advised of the applicable constitutional and statutory rights. Thereafter the defendant entered a plea of not guilty to LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, FELONY, I.C. 18-1508. Trial was held before the court and a jury and on the 6th day of May, 1987, the jury returned its verdict that the defendant was guilty of LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, FELONY, I.C. 18-1508, TWO COUNTS.

Sentencing was continued for preparation of a presentence report which was completed and reviewed by the court and counsel. Counsel for State and for the Defendant made statements and the Defendant was given the opportunity to make a statement and offer evidence in mitigation. Inquiry was made by the Court to determine if there was any legal cause why judgment should not be pronounced and there being none the Court rendered Judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the defendant is guilty of the crime of LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, FELONY, I.C. 18-1508, two counts. As a consequence the defendant is sentenced to the State Board of Correction for a term not to exceed twenty (20) years with credit for 162 days served prior to sentencing on Count I, and is sentenced to the State Board of Correction for a term not to exceed twenty (20) years with credit for 162 days served prior to sentencing on Count II, sentences shall run concurrent. Sentence shall commence June 1, 1987.

Dated this 4 day of June, 1987.

/s/ Gerald F. Schroeder
GERALD F. SCHROEDER
District Judge

IN THE DISTRICT COURT OF THE FOURTH
JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF ADA

Office of the Clerk of the Fourth Judicial)
District of the State of Idaho,) ss.
in and for the County of Ada)

I, John Bastida, Clerk of the District Court aforesaid, do hereby certify the foregoing to be a full, true and correct copy of the judgment made and entered on the minutes of the said District Court in the above entitled action, that I have compared the same with the original, and that the same is a correct transcript therefrom and of the whole thereof.

ATTEST My hand and the seal of said District Court
this 3 day of June, 1987.

JOHN BASTIDA
Clerk

By /s/ Sandra Connolly
Deputy

CASE NUMBER 14013

THE STATE OF IDAHO

To the Sheriff of the County of Ada, State of Idaho, and
the Director of the Board of Correction of the Idaho State
Penitentiary:

WHEREAS, LAURA LEE WRIGHT, having been duly
convicted in our District Court of the Fourth Judicial
District of the State of Idaho, in and for said County of
Ada, of the crime of LEWD CONDUCT WITH A MINOR
UNDER SIXTEEN, FELONY, I.C. 18-1508, TWO COUNTS.

and [sic] judgment having been pronounced against her that she be committed to custody of the State Board of Correction of the State of Idaho for a term not to exceed twenty years with credit for 162 days served prior to sentencing on Count I, and a term not to exceed twenty years with credit for 162 days served prior to sentencing on Count II, sentences shall run concurrent.

all [sic] of which appearing to us of record, and a certified copy of the judgment being endorsed herein and made a part hereof;

NOW, THIS IS TO COMMAND YOU, The said Sheriff of the County of Ada, to take and keep and safely deliver the said LAURA LEE WRIGHT into custody of the Director of Correction of the State Idaho [sic] Penitentiary at your earliest convenience.

AND THIS IS TO COMMAND YOU, The said Director of Correction, to receive of and from the Sheriff of the County of Ada, the said LAURA LEE WRIGHT convicted and sentenced as aforesaid, and keep her in the custody of The State Board of Correction of the State of Idaho for a term not to exceed twenty years with credit for 162 days on Count I, and a term not to exceed twenty years with credit for 162 days served prior to sentencing on Count II, sentences shall run concurrent.

And these presents shall be your authority for the same, Herein fail not.

WITNESS: Hon. Gerald F. Schroeder, Judge of the District Court, at the Court House in the said County of Ada, this 1st day of June, 1987.

ATTEST my hand and the seal of said Court, the day and year last above written.

JOHN BASTIDA
Clerk

By /s/ Sandra Connolly
Deputy

Filed
JUL 6 1987

Laura Lee Wright
Hospital North Drive #23
Orofino, Idaho 83544

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for Appellant Pro Se

IN THE DISTRICT COURT OF THE FOURTH
JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,	)	Criminal Case
	)	No: 14013
Plaintiff-Respondents,)	
	)	Supreme Court
-vs-	)	No:
)	
LAURA LEE WRIGHT,	)	NOTICE OF
	)	APPEAL
Defendant-Appellant.)	

TO: The respondents above named, THE STATE OF IDAHO, and their Attorneys, THE ADA COUNTY PROSECUTING ATTORNEY, GREG H. BOWER, (room 103 Ada County Courthouse, Boise, Idaho 83702) and the CLERK OF THE ABOVE ENTITLED COURT,

NOTICE IS HEREBY GIVEN THAT:

1) The above named defendant Laura Lee Wright hereby appeals against the above named respondents to the IDAHO SUPREME COURT from the Judgement of Conviction and the Order committing the Appellant to the care and custody of the Idaho Department of Corrections for a term not to exceed (20) years, entered in the above entitled court on or about the 12th day of May, 1987, the Honorable Gerald F, [sic] Schroeder judge presiding.

2) The Appellant has the right to appeal to the Idaho Supreme Court, and the Judgements or Orders described in paragraph (f1) are appeallable [sic] orders under and pursuant to Rule 11 (5)(c)(1) of the Idaho Appellate Rules.

3) The appellant requests the preperation [sic] of the following portions of the reporter's transcript to wit;

a. The entire reporters standard transcript as defined in Rule 25 (a) I.A.R.

4) The appellant hereby certifies that service of this Notice of Appeal has been made on the Court Reporter.

5) The appellant is exempt from paying the estimated cost of preperation [sic] of the transcripts, the estimated fee of preperation [sic] of the record, and the Appellant filing fee in this matter by the fact the appellant was found to be indigent and was granted leave to proceed in Forma Pauperis in the above entitled court.

6) The appellant hereby certifies that service has been made upon all parties pursuant to Rule 20 I.A.R.

7) The appellant certifies that a copy of this Notice Of Appeal has been served on the Attorney General of the State of Idaho pursuant to *Idaho Code* 67-1401 (1). DATED this 1 day of July, 1987

/s/ Laura Lee Wright
Laura Lee Wright
Appellant Pro Se

STATE OF IDAHO)
COUNTY OF CLEARWATER) ss.

LAURA LEE WRIGHT after being duly sworn upon her oath deposes and says:

THAT she is the Appellant in the above entitled action and that all statements in this Notice of Appeal are true and correct to the best of her knowledge and belief.

/s/ Laura Lee Wright
Laura Lee Wright
Appellant Pro Se

HEARING ON MOTION IN LIMINE

* * *

(p. 9) MR. NAYLOR: Your Honor, I believe, as per our pretrial (p. 10) conference, if it's the Court's intention, I'm prepared to discuss the out – the hearsay statements made by the two children at this time, and what – and make an offer of proof as to what those statements will be testified to by the witnesses.

THE COURT: The State is relying upon Idaho Code Section 30 – 19-3024 in this area? Is the State also prepared to proceed with an offer that would potentially take the matters out of hearsay objection pursuant to Idaho Rule of Evidence 803-24?

I think I will state at this time that at least it is my understanding from the spokesman for the rules of evidence at the time that they were under consideration and subsequently adopted by the Supreme Court, that they were considered to be exclusive and preclusive of the legislature acting in areas of this nature.

Is the State relying solely upon the code section which may or may not be inconsistent with the Rules of Evidence, or is it the State – or is the State in a position to proceed with any claimed exception under Rule 803?

MR. NAYLOR: Your Honor, I believe that the offer of proof would be the same for 803, subsection 24 at this point in time as well as Idaho Code Section 19-3024.

THE COURT: Any objection to making an offer of proof (p. 11) at this time? Or did you wish to have that deferred until after the jury is selected?

MR. HAYNES: I think an offer of proof is acceptable.

THE COURT: Did you wish to make the offer?

MR. NAYLOR: Thank you, Your Honor. For the record, I would indicate that Defense Counsel has been provided copies of statements, written statements made, but I will proceed with, as well as I have been notified, that the State would be proceeding based upon Section 19-3024.

At this time the hearsay statement made by Jeannie Wright to Cynthia Goodman, first of all on November 8th, 1986. Cynthia Goodman is the girlfriend of Lewis Wright, the father of Jeannie Wright on November 8th. Testimony will be provided that Jeannie was in the custody of Cyndy and Lewis and that on this occasion, and while Cyndy was giving Jeannie a bath, Jeannie disclosed, for the first time, and to our knowledge, the events that the Defendants are charged with, specifically, perhaps I can offer into the record the written statements and proceed by outlining each one of those.

THE COURT: Mark that as offer of proof Exhibit No. 1.

(Exhibit No. 1 marked for identification.)

MR. NAYLOR: At that time, on November 8th, Cyndy was – and for the record, I've availed Mr. Haynes the copy of that Exhibit. At that time Jeannie disclosed that, as (p. 12) outlined in that statement, that Bobby had hurt her and then went into specifics relating to sexual intercourse where she was bleeding, where there was detailed statements made by her that a white gooey substance was found in her vaginal area and that it hurt; that

he would get on top of her with his clothes removed and that he would move and move and move and at that time then there would be a white gooey substance in this – her vaginal area and she would clean up by using toilet paper because of the bleeding in that area.

She stated also, as outlined in that Exhibit, that this happened before her birthday happened, more than once and that another person, Ray was named as also having done this.

Your Honor, based on that – the written statement by Cynthia Goodman of that conversation, I believe that under Rule 804 – excuse me, 803, that the statement is offered as evidence of a material fact. The allegations and the information indicate that such statements, if shown to be true, would prove the material elements of this crime as charged.

I might add that Jeannie also disclosed that her mother was present on most of the occasions and that she would participate by holding her legs, or holding her mouth if she were to scream, as well as helping her to clean up afterwards.

(p. 13) Part B, the statement is more probative offered as evidence – excuse me, more probative than any other evidence, and I believe that the statement made by Jeannie as a first hand eyewitness would fall under that, and that the interests of justice would be best served. Under Section 19-3024 as well, the code requires that this Court find at this point in time, that reliability of the statements as to their time, content and circumstances, and I believe a reading of that statement would produce that.

The second hearsay statement would be a tape recording made on November 24th, 1986. This goes - I do not have a transcript of that, but this is a tape recording made by Cynthia Goodman with Jeannie Wright in an interview fashion. I believe most properly that that is close to proximity to the time that she first disclosed to Cynthia Goodman her statements. They are consistent with the statements outlined in Cynthia Goodman's written statement and more properly that is evidence that would be essentially more probative than anything short of Jeannie Wright testifying in that the Court and the jury will be able to hear the questions that were asked, put to Jeannie, as well as her response, and be able to judge somewhat the demeanor and credibility of the witness at that time.

The third set of hearsay statements would include, on November 9th at the hospital, the report to (p. 14) Dr. Johnson, Dr. Mark Johnson who first examined Jeannie at St. Alphonsus Hospital. Cynthia Goodman was present at that time, but the principal witness testifying to that interview would be Dr. Mark Johnson. At that point in time she related, as to his questions, basically the same information of abuse, identifying the perpetrators as Bobby and her mother, Laura, and the Court's been provided with a copy of Dr. Johnson's statement outlining his conversation.

Also, in all of these statements that I've mentioned to this point, Jeannie also told the potential witnesses that this also happened to her little sister, half-sister Kathy Wright who was two years old, and basically alleging the same acts and over the same period of time from - after

her birthday, which is April 1st. She also told that to Dr. Johnson at the hospital.

Your Honor, I believe that her statements to Dr. Johnson would also come in under the hearsay exception of Rule 803, subsection four, statements for purposes of medical diagnosis or treatment where Dr. Johnson, in his physical examination, and possibly ascertaining the history behind the physical evidence that he observed as well as confirming any physical evidence in his examination was found; that her statements would help in the diagnosis and treatment at that point in time.

(p. 15) The State also will be presenting testimony by Dr. John Jambura who, on November 10th at his office in Ada County, interviewed and examined Kathy Wright, the two-year-old. At that point in time, he asked some general questions, and he has outlined those in his summary examination, which the Court has a copy of, and that he asked, in general, "Do you play with your daddy? Do you play with him outside? Do you play with him inside?" And, "Does your daddy play with you and where does he play with you?"

And the - at that point in time Kathy stated that, in response to Dr. Jambura's question, "Does daddy play with you? Yes. does daddy touch you with his pee-pee?" And, "Do you touch his pee-pee?" And the child admitted that she had been touched by her father's pee-pee, but would not explain exactly how. But then she volunteered that daddy did that a lot more to my sister than to me.

There also – the State would be relying upon the Section 19-3024 as well as Rules of Evidence 803, subsection 4 and subsection 12.

Also the statements made by Jeannie Wright on November 9th at the hospital, first to Officer Thomas Paulson of the Boise Police Department, he's in uniform. He was called to the scene at the time when, as a – Cynthia and Lewis had called the police to find out what they should (p. 16) do and they were told to take Jeannie to the hospital for examination. At that point in time, Officer Holst was called to the scene to investigate. He spoke with Jeannie, and as outlined in his police report, described the circumstances and the statements made by Jeannie to him; which are also consistent with the other statements that she had made prior to that time to Cynthia; that Bobby took her into a bedroom and took her clothes off, then mommy held me down on the bed and sometimes covered my mouth so I wouldn't scream.

Officer Holst then asked generally what happened and she stated, "Bobby stuck his thing in my pussy."

I asked Officer Holst – asked if it hurt, she nodded her head in the affirmative. He asked her when it happened, she indicated once, again, just before her birthday, which was April 1st.

This all occurred on November 9th, 1986. When asked if it happened again she nodded in the affirmative. However, she was not able to tell Officer Holst exactly how many times it happened.

Finally, Detective Larry Armstrong of the Boise City Police Department, following the physical examination of

Dr. Johnson, Dr. Jambura and Dr. Bauer at the hospital and the interview by Officer Holst, spoke with Jeannie and his report, as well as his testimony at the preliminary (p. 17) hearing indicate that he was not interviewing Jeannie for detail, but was concerned mainly at that point in time of the imminent danger and potential danger that her two-year-old half-sister Kathy was in, since she was still in the custody of the Defendants, Bobby and Laura.

And in general, she generally told to Detective Armstrong that Bobby would hurt her, made her scream, her mother would cover her mouth and that she saw Bobby hurt Kathy and she said Kathy really screamed louder than me, end quote.

Your Honor, there's also statements made by Jeannie Wright to Dr. Michael Eisenbeiss and Carol Sorini who have been – who Jeannie has been seeing for therapy. Carol Sorini is a licensed counselor, Dr. Eisenbeiss has his Ph.D. in counseling and those statements, I believe, would come in under the – in their testimony under Idaho Rules of Evidence, Rule 709, I believe it is – excuse me, 703, the basis for testimony by experts that if – of a type reasonably relied upon by experts in the particular field in performing opinions or inferences upon the subject, the fact or date need not – shall be admissible in evidence. I believe the – that those hearsay statements, the experts will testify those are forms of therapy, discussions with patients that are relied upon by experts in that field to do – make diagnosis and treatment decisions as well as for (p. 18) therapeutic advancement of the patient.

For those reasons, I believe that their statements would be admissible under that exception as well. And

the State would not be relying solely upon that rule, but inclusive of all the others stated earlier.

Those are the hearsay statements that the State intends will be – will come forward in the evidence through the State's witnesses.

THE COURT: May I take into account in the offer of proof the evidence submitted at the preliminary hearing as to the conditions that existed?

MR. NAYLOR: Yes, Your Honor. I've provided a copy of the testimony pertaining to that in the offer of proof Exhibit, but should there be any other statements or testimony at the preliminary hearing we'd ask the Court to rely upon that also.

THE COURT: Did you wish to respond?

MR. HAYNES: Your Honor, I have a couple of questions, procedural, I guess. I'm not sure it's been established pursuant to the statute who was present at several of these, and I think that's part of the circumstances. Several of these conversations, specifically the November 9th conversation with Mark Johnson who was present during that conversation. Is that okay if I ask the –

THE COURT: Certainly.

(p. 19) MR. NAYLOR: I believe that the evidence will show that Dr. Johnson was present, that Cynthia Goodman was present and Lewis Wright.

MR. HAYNES: And November 10th conversation between Dr. Jambura and Kathy Wright?

MR. NAYLOR: Dr. Jambura, I believe, was the only person present. I don't believe his nurse was present.

MR. HAYNES: The November 9th conversation with Officer Holst?

MR. NAYLOR: That, I believe, was simply Officer Holst prior to –

MR. HAYNES: And the conversation of November 9th with Detective Armstrong?

MR. NAYLOR: At that point in time it was – it's unclear who may have heard the conversation, but Lewis Wright, Cynthia Goodman and Mary Lou Pierce from the Department of Health and Welfare may have been present.

MR. HAYNES: Okay. Thank you.

The other question I have is how the date of November 24th was arrived at from the tape recording, Your Honor. I have a copy of that tape recording and I don't have any indication of the date.

MR. NAYLOR: Okay. Cynthia Goodman presented that to me on the date of the preliminary hearing, which was November 26th, and indicated that she had made it (p. 20) approximately a couple days before the preliminary hearing.

MR. HAYNES: Okay. Thank you.

Your Honor, procedurally I'm not sure at this point how the Court wants to go forward. Is this the time for me to make my specific legal objections to the 19-3024 and to the catchall hearsay exception, medical records exception?

THE COURT: You can if you wish to do so at this time, or you can wait until witnesses are actually called

and would be asked to testify. You wish to state the objection then, you can do so.

MR. HAYNES: I think I'd prefer to wait, Your Honor, until the witnesses are actually called, and I know that will require, then, another hearing outside the presence of the jury, but -

THE COURT: How long would you expect your arguments to take on those matters?

MR. HAYNES: I think it could take as much as a half hour, maybe 45 minutes, and I'm thinking long so that the Court isn't misled on that. There may be some things to present in rebuttal of the reliability of certain statements.

THE COURT: There are different exceptions claimed as to different witnesses. Will we be able to deal with - in general, with the majority of objections, each of those?

(p. 21) MR. HAYNES: Yes.

THE COURT: I can defer, then, until witnesses - there is actually an effort to call the witness. I will consider the offers under, of course, the statute and consider whether they are - would be admissible under the statute also under the Rules of Evidence and will attempt to rule on those matters covering those bases.

MR. HAYNES: Okay.

THE COURT: Anything else that should be taken up before the Jury is brought over?

MR. HAYNES: There is from the Defense, I'm not sure the Prosecutor is done yet.

MR. NAYLOR: Your Honor, simply then procedurally would the State be allowed to present any other offers of proof for reliability at the time, if there's an objection?

THE COURT: If there is an objection, yes, the State may pursue further offer of proof and have further opportunity to respond.

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VOIR DIRE OF KATHY WRIGHT

* * *

(p. 182) MR. NAYLOR: Your Honor, perhaps I should have mentioned this beforehand. The first witness I'd call would require to be done outside the presence of the jury.

THE COURT: Very well. If you'll take the jury out, please.

(Jury out.)

MR. NAYLOR: State would call Kathy Wright and she will be here presently.

THE COURT: Very well.

(Brief delay.)

(p. 183) VOIR DIRE EXAMINATION

BY THE COURT:

Q. Hi, Kathy. Can you tell me your name please?

A. (No audible response.)

Q. Are you kind of scared? Can you tell me your name, and tell me how old you are?

A. Kathy Wright.

Q. Who do you have with you there that you're holding - can you tell me the names of the toys that you have that you're holding?

A. Kathy Wright.

Q. That's your name? Okay. How old are you, Kathy? How old are you?

A. My - Kathy Wright.

Q. Can you tell me the names of your father and your mother?

A. No.

Q. Do you know their names?

A. (No audible response.)

Q. Can you tell me what they are?

A. What?

Q. Do you know where you are right now?

A. No.

Q. Kathy, can you come on over here where I can talk to you a little better.

(p. 184) Can you tell me the name of this fellow? What's this guy's name? That's your teddy bear? And what's this guy?

A. Puppy Wright.

Q. Is that a puppy? Do you call him "Puppy Wright"?

A. Um-hum.

Q. Your name is Kathy?

A. (No audible response.)

Q. Can you tell me how old you are, Kathy?

A. Kathy Wright.

Q. Um-hum. Do you know how old you are? Are you on - go to school at all? Do you go to a day care center or anything?

A. No school.

Q. Okay. What do you do for fun? What do you play? I can't under - are you kind of scared being here with all these people?

A. And if - (nod of the head.)

Q. Would you rather be someplace else, playing?

A. (Affirmative nod.)

Q. Do you know how many years you've been alive?

A. Six.

Q. Six years? How old do you think you are?

A. Six years.

Q. Six years. Do you know how old these little guys (p. 185) are that you're holding? Puppy Wright, do you know how old Puppy is?

A. And if I have - (affirmative nod.)

Q. Where did you get him? Somebody give him to you?

A. (Affirmative nod.)

Q. Do you recall who gave him to you?

A. (Affirmative nod.)

Q. Come on around, take a look and see if there's anything that interests you. Do you know what this is?

Say something into that real loud. Do you know what that is? Talk real loud at that. Can you say your name into that?

A. (Negative nod.) What is it on?

Q. That will make your voice real loud if you talk into it. Ever seen one of those?

A. (Negative nod.)

Q. Did you ever watch television?

A. (Affirmative nod.)

Q. See, sometimes on television people wear those. Can you say your name into that?

A. (Negative Nod.)

Q. That's kind of hard, isn't it. Well, would you like to go someplace else other than here?

A. (Affirmative nod.)

Q. Un-hum. Can I see him for just a minute? Can you see that?

(p. 186) A. (Affirmative nod.)

Q. This says "Preppy Bear".

A. (Affirmative nod.)

Q. Has anybody talked to you about why we're visiting today?

A. (Affirmative nod.)

Q. Do you know why you're here?

A. (Affirmative nod.)

Q. Can you tell me?

A. (Negative nod.)

Q. No. Well, want to look in there?

A. (Negative nod.)

Q. Kind of an ugly thing, isn't it?

A. What's this?

Q. That's a drawer. That's a drawer and look there, see, there's a fork, a plate, just a drawer.

A. What's that?

Q. That's a tea bag. I don't know why there's a tea bag in there. I'm glad that there's nothing worse than that. Some paper, nothing very interesting is there. Can you push that closed? That's kind of heavy. I don't know if we have any more things for you to explore or not. Probably nothing more interesting. Looks like about the same type of stuff. Do you know what this is?

A. (Affirmative nod.)

(p. 187) Q. Do you know what that is?

A. (Affirmative nod.)

Q. That's a paper clip. Don't want to put that in your mouth, you know, you could choke on that. It might hurt you.

A. (No audible response.)

Q. That's a paper clip. Papers, I don't know if - that's empty. You want to look in that bottom one?

A. (Negative nod.)

Q. No? Probably empty too. Do you know what that is over there (indicating)?

A. (Affirmative nod.)

Q. What would you call that?

A. Star.

Q. Is that a star? That kind of looks like a big scarf doesn't it. Do you have any pets?

A. (Negative nod.)

Q. Don't have a pet? Don't have a pet frog, lizard?

A. (Negative nod.)

Q. Do you know what these are?

A. (Affirmative nod.)

Q. What would you call those?

A. Books.

Q. You are right, those are books. Those are called law books.

(p. 188) A. This.

Q. That's right, a lot of books. Do you know the name of the woman that you came up her with today, brought you up here?

A. (Affirmative nod.)

Q. Can you tell me her name?

A. (Negative nod.)

Q. Do you have books yourself?

A. (Negative nod.)

A. I don't - I got my own books.

Q. You have your own books?

A. At my home.

Q. At your home? Do you like your books?

A. Books.

Q. Does somebody read those books to you?

A. (Affirmative nod.) Tracy did.

Q. Um-hum. What's this? Do you know what that is? That's a watch. Have you ever seen one like this?

A. No, mine got no -

Q. Some of the watches just have numbers on them. This is a pretty dull place to be isn't it?

A. (Affirmative nod.)

Q. Why don't - would you like to get out of here and go someplace else?

A. (Affirmative nod.)

(p. 189) Q. I think I can agree with that.

THE COURT: Take a short recess at this time.

(Recess taken. Jury out.)

THE COURT: The record will reflect that the jury is not present at this time. Counsel, will you - did you wish

to be heard on the issue of whether the child is capable of testifying at this time?

MR. NAYLOR: No, Your Honor.

THE COURT: Is there any disagreement that she is not capable of communicating to the jury?

MR. NAYLOR: No, Your Honor.

MR. HAYNES: No disagreement.

THE COURT: Very well. If you'll call your next witness.

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TESTIMONY OF JEANNIE WRIGHT

(p. 206) JEANNIE WRIGHT,

a witness called on behalf of the Plaintiff, having been first duly sworn, took the stand and testified as follows:

THE COURT: Jeannie, do you know that that means that you have to tell the truth?

A. (Witness nods head.)

THE COURT: Do you understand that?

A. (Witness nods head.)

MR. NAYLOR: Your Honor, may I approach the witness?

THE COURT: You may also if you wish to.

MR. HAYNES: Thank you.

(p. 207) DIRECT EXAMINATION

BY MR. NAYLOR:

Q. Jeannie, here is some water. If you could sit on that big chair. Sit right there. Jeannie, can you tell me what your name is?

A. Jeannie.

Q. What's your last name?

A. Wright.

Q. And how old are you?

A. Six.

Q. When was your birthday?

A. April.

Q. Do you know the day?

A. No.

Q. Did you have a birthday?

A. Yeah.

Q. When was that?

A. I don't remember.

Q. Do you know who these people are over here (indicating)?

A. (Witness shakes head.)

Q. Is it the jury there, the jury? They're the people that you get to talk to today. Can you spell your first name?

A. Yeah.

(p. 208) How do you spell your name?

A. J-e-a-n-n-i-e.

Q. Good.

Q. And can you tell me what color my shirt is?

A. White.

Q. Do you know what color this tie is?

A. Red.

Q. Yeah. You know your colors really well. When - do you have a sister?

A. Um-hum.

Q. What's her name?

A. Kathy.

Q. And how old is she?

A. Three.

Q. Do you know when her birthday is?

A. April.

Q. Do you know the day? April 1?

A. April 6th.

Q. And does yours come first or after hers?

A. First.

Q. Oh. And who is your daddy?

A. Lewis.

Q. And who is your mom?

A. Laura.

Q. Okay. And do you know who Kathy's dad is?

(p. 209) A. (Witness nods head.)

Q. Who is that?

A. Bobby.

Q. And who is Kathy's mom?

A. Laura too.

Q. Oh. Now, do you know what telling the truth means?

A. Yeah.

Q. Do you know what telling a lie means?

A. (Witness shakes head.)

Q. What does telling the truth mean?

A. That means -

Q. Means what?

A. No lying.

Q. Okay.

Q. Can you tell me - well, what happens if you tell a lie?

A. I'll get spanked.

Q. And what happens if you tell the truth?

A. I wouldn't get spanked.

Q. You don't get spanked if you tell the truth?

A. No.

Q. Okay. Do you know what - if something is real - let me - if I said to you that there is a big white bunny right there, is that real or pretend?

(p. 210) A. No.

Q. What is that? Is that real or pretend?

A. Pretend.

Q. Okay. If I said that I'm wearing glasses, is that real or pretend?

A. Real.

Q. And is real the truth or a lie?

A. The truth.

Q. Okay. Did you have a birthday party?

A. Yes.

Q. And do you remember who was there?

A. Yeah.

Q. Who was there?

A. Benae and my mom and - and Bobby and Laura - I mean Roger and Sue.

Q. When you say your mom, who do you mean?

A. That's not my mom.

Q. Oh, Okay. Roger and Sue - who do you live with right now?

A. Bobby and Sue.

Q. Who else lives there?

A. Me and Kathy.

Q. Anybody else?

A. Amy and Jeremy.

Q. Okay. Who is Amy and Jeremy?

(p. 211) A. They are our brothers.

Q. Oh. Who is their mommy and daddy?

A. Roger and Sue.

Q. Okay. If I told you that I came to your birthday party would that be real or pretend?

A. Pretend.

Q. How come?

A. Because you were in court.

Q. Oh. Okay. Now -

MR. NAYLOR: May I have this marked as State's Exhibit No. 1.

(State's Exhibit No. 1 marked for identification.)

MR. NAYLOR: For the record, I'm showing it to Counsel.

MR. HAYNES: Um-hum.

Q. BY MR. NAYLOR: Jeannie, I'm showing you this picture. Have you ever - what is that? Do you recognize that?

A. (Witness nods head.)

Q. What is that?

A. That's where me and Bobby use to live, and my mom.

Q. Who lived there at that house?

A. Bobby and Laura and me and Kathy.

Q. Oh, okay.

(p. 212) Q. And were you living there when you had your last birthday? Not this birthday this year?

A. No.

Q. Okay. But were you living there during - oh, were you living there at Christmas?

A. (Witness nods head.)

Q. Okay. Was that - who were you with during Christmas, this last Christmas?

A. With Roger and Sue.

Q. Okay. And so were you living at that house during that Christmas?

A. Huh-uh.

Q. Oh, was it another Christmas?

A. Um-hum.

Q. Oh. Did that Christmas when you were living there, did that - was that before the Christmas with Roger and Sue or after?

A. After.

Q. After? Did it happen before or after?

A. Nothing happened to me after.

Q. Okay.

Q. What does private touching mean to you?

A. What?

Q. What does private touching mean?

A. I don't know.

(p. 213) Q. Okay. Have you ever talked about private touching?

A. (Witness shakes head.)

Q. Is that - is it because you've never talked about it, or don't want to talk about it right now?

A. I don't want to talk about that right now.

Q. Take a deep breath. Now, it's important for you to tell us what happened, and we only have a few questions, so will you tell us? I know it's really hard for you.

A. One time I did with you and Carol.

Q. What did you do?

A. I told you the touching happened to me and Kathy.

Q. Did that make you feel better to talk about it?

A. (Witness nods head.)

Q. Carol here today?

A. (Witness nods head.)

Q. Okay. Did you ever tell Cyndy about the private touching?

A. (Witness nods head.)

Q. Do you remember where you were when you told her about that?

A. The bathtub.

Q. Oh. And whose house was that?

A. Cyndy's house.

Q. Was that - do you remember Thanksgiving?

(p. 214) A. Um-hum.

Q. Where did you go have Thanksgiving dinner?

A. With my dad.

Q. And who is your dad?

A. Lewis.

Q. And did you tell Cindy about this private touching in the bathroom before or after that Thanksgiving?

A. After.

Q. Well, had you talked to her – did it happen – did it – did you talk to her before you went to Lewis's for Thanksgiving?

A. Um-hum.

Q. Now, is Kathy here today?

A. Yes.

Q. Where is she?

A. She's downstairs playing on the floor.

Q. Now, did any private touching happen to Kathy?

A. Yes.

Q. And who did that private touching?

MR. HAYNES: Objection; without foundation, Your Honor.

THE COURT: Overruled. She may answer.

Q. BY MR. NAYLOR: Who did that private touching, Kathy?

A. Bobby.

(p. 215) Q. And who else? Was there anyone else?

A. (Witness shakes head.)

Q. Jeannie.

A. What?

Q. Is it because no one else was there, or you just don't want to talk about that?

A. I don't want to talk about that.

Q. How do you know that Kathy was touched?

A. Because I was in my room.

Q. Were you in your room?

A. Yes.

Q. And where were they?

A. They were in my room, too.

Q. Can you tell me what Bobby did?

A. (Witness shakes head.)

Q. I know it's really hard.

A. I want to get this off (indicating).

Q. Do you want me to help you get that off? We'll tuck it right there in your socks. Okay. Did this same kind of touching by Bobby happen to you?

A. (Witness nods head.)

Q. And was anyone else there when Bobby touched you?

A. No.

Q. Where was your mommy?

A. In my room too.

(p. 216) Q. And what was your mommy doing?

A. Holding my legs and holding my mouth so I wouldn't scream.

Q. And what was Bobby doing?

A. Pumping me.

Q. What would he do when he would be on top of you?

A. I don't want to talk about that.

Q. Okay. Let's talk about something else then. Did - where did this happen?

A. In my room.

Q. In your bedroom? And whose house was that?

A. The house right there (indicating).

Q. This house in this picture?

A. Yeah.

Q. State's Exhibit 1 that's been marked? Okay.

Did this happen - when did this happen? Do you remember the first time it happened?

A. (Witness shakes head.)

Q. Do you remember, did it happen more than once?

A. (Witness nods head.)

Q. Okay. Did Bobby or your mommy ever tell you not to tell anybody about this?

A. (Witness nods head.)

Q. What did they tell you would happen if you told about this?

(p.217) A. I'd get a spankin.

Q. So did you tell anybody about this before you talked to Cyndy?

A. (Witness nods head.)

Q. Who did you tell?

A. Cyndy.

Q. Just Cyndy?

A. (Witness nods head.)

Q. After you talked to Cyndy about it, did you tell anybody else?

A. Huh-uh.

Q. Well, have you told me about it?

A. Um-hum.

Q. Oh, okay. Well, let's see if there's somebody else. Did you tell Lewis about it?

A. No.

Q. Didn't talk to him about it at all?

A. He took me to the doctor.

Q. Oh. Do you remember when that happened?

A. That was after I had take the bath.

Q. You mean the day that you took the bath and talked to Cyndy?

A. Then we - he got in from work and then we went to the doctor.

Q. Oh, is that doctor a nice doctor?

(p. 218) A. Yeah.

Q. I'll bet. Was there more than one doctor? Do you remember?

A. There's only one.

Q. Oh. And did you tell that doctor about the private touching?

A. No.

Q. Is that because you don't remember?

A. Um-hum.

Q. Well, remember you talked to the judge about telling the truth, and it's important that you remember. Was there - when - was there anybody else there at the hospital? Was there a policeman?

A. Um-hum.

Q. And what did that policeman do?

A. He didn't do anything but help me.

Q. Helped you? Are policeman good?

A. Yeah.

Q. Yeah. Did he talk to you?

A. Yeah.

Q. Did he talk to you about the touching?

A. No.

Q. Now, you remember - do you remember that or is that-not - or is that - do you remember talking to the officer?

(p. 219) Yeah.

Q. Okay. And do you remember telling him about the touching by Bobby?

A. Huh-uh.

Q. Okay. Now, when Bobby would do this private touching, be on top of you, would that hurt?

A. (Witness nods head.)

Q. And I know this is really hard, but can you tell me what would happen after he would do this? What would you do?

A. Go out and play.

Q. Okay. Do your remember telling Cyndy that you would have to clean up with toilet paper?

MR. HAYNES: That's too leading at this point.

THE COURT: Overrule if objection.

Q. BY MR. NAYLO?: Do you remember telling Cyndy that?

A. (Witness nods head.)

Q. Was that the truth when you told Cyndy?

A. (Witness nods head.)

Q. Can you tell us about that?

A. (Witness shakes head.)

Q. Is that because you can't - don't want to talk about it?

A. (Witness nods head.)

(p. 220) Q. Jeannie, can you tell me one thing that you would do to clean up just one thing?

A. We had to clean up cause my mom asked me to.

Q. So would your mommy help you?

A. (Witness nods head.)

Q. Is that Laura?

A. Um-hum.

Q. And what would she do to help you?

A. She - she didn't do anything.

Q. She would what?

A. Do A, B, C's.

Q. Do A, B, C's? Would Laura give you any toilet paper to help you?

A. (Witness shakes head.)

Q. Okay. Now when you saw Bobby and your mommy doing the private touching to Kathy, do you remember what Kathy was doing?

A. (Witness shakes head.)

Q. Do you remember telling Cyndy that Kathy was screaming too?

A. Um-hum.

MR. HAYNES: Objection. Again leading, Your Honor.

THE COURT: Overrule the objection.

Q. BY MR. NAYLOR: When you told Cyndy that, did that really happen?

(p. 221) A. (Witness nods head.)

Q. You're doing really good, Jeannie. I want you to tell me about school. Let's talk about school for a minute. Do you like to go to school?

A. Yes.

Q. What are some things you do at school?

A. I have to do what my teacher asks me to do.

Q. And does she have you draw pictures?

A. Yes, or somebody that's moving.

Q. Who was moving. Do you know?

A. One people moved is named Jeff and then other people moved, her name is Amber.

Q. Oh. Jeannie did this private touching, did it happen before or after your birthday last year?

A. After my birthday.

Q. Was that the first time it happened?

A. What?

Q. Did it happen before your birthday too?

A. Um-hum.

Q. And when you say this happened to Kathy, did that happen before or after your birthday?

A. After my birthday.

Q. Was that while you were still living with Bobby and Laura and Kathy in that house in that picture?

A. (Witness nods head.)

(p. 222) Q. Did any private touching happen any place other than in your bedroom there, that house?

A. Huh-uh.

Q. Has Lewis ever touched you like that?

A. (Witness shakes head.)

Q. Is that the truth, or do you just don't want to talk about it?

A. I don't want to talk about it.

Q. Can you tell me, has anybody else touched you like that?

A. No.

Q. Do you remember telling Cyndy that Ray also touched you like that?

A. Huh-uh.

MR. HAYNES: Objection. As leading.

THE COURT: Overrule the objection.

Q. BY MR. NAYLOR: You don't remember that?

A. (Witness shakes head.)

Q. Okay. You're doing really good. Are you nervous -

A. (Witness nods head.)

Q. - and kind of scared?

A. (Witness nods head.)

Q. Well, you don't have to be. Now, do you remember coming to live with Lewis and Cyndy just last year?

(p. 223) A. Yes.

Q. Okay. Do you remember Halloween?

A. Yes.

Q. Did you dress up for Halloween?

A. Yes.

Q. What did you dress up like?

A. A witch.

Q. A witch? And did Kathy dress up like something too?

A. A witch too.

Q. Oh. Where were you living? Who were you living with?

A. Cyndy.

Q. Cyndy and Lewis?

A. (Witness nods head.)

Q. Okay. When Bobby and Laura would do this to you, would that be during the daytime or at night time? Do you remember?

A. (Witness shakes head.)

Q. What would you be wearing?

A. My pajamas.

Q. Oh, okay. So would that be because you were going to bed?

A. (Witness nods head.)

Q. Do you remember what Bobby would wear?

(p. 224) A. Huh-uh.

Q. Is that hard to think about?

A. (Witness nods head.)

Q. Can you just tell us what you remember just - can you think of one time that it happened? Just tell us on that time what Bobby would be wearing?

A. He was wearing shorts and shirt.

Q. Shorts and a shirt? Okay. And would he take off his shorts or his shirt?

A. (Witness shakes head.)

Q. Where did - where - can you tell me where the private touching would happen on you?

A. Down below.

Q. Down below? Can you point for us?

A. (Witness shakes head.)

Q. Is that hard to do?

A. (Witness nods head.)

Q. Was it - can you tell me if it was like below your waist down here (indicating)?

A. (Witness shakes head.)

Q. Do you not want to talk about that?

A. Huh-uh.

Q. Tell me - just a few more questions, okay, and we'll be all done?

A. (Witness nods head.)

(p. 225) Q. Tell me what Bobby would do that would hurt? Why would it hurt?

A. Because he got on top of me.

Q. And what would he do?

A. That's hard to talk about.

Q. I know it's hard to talk about. Can you just tell us - tell me about this and we'll talk about something else, okay?

A. (Witness nods head.)

Q. Okay. So tell me when he'd got on top of you, where would it hurt?

A. Down below.

Q. Can you tell me why it would hurt?

A. Because.

Q. Did he touch you with his finger?

A. Um-hum.

Q. Did he touch you with anything else?

A. (Witness shakes head.)

Q. Is that hard to talk about?

A. (Witness nods head.)

Q. Is that - well, when he was on top of you, what would he be doing?

A. That's hard to talk about.

Q. Can you? I know it's hard, but you're just really good. Can you tell us, just think of one time and (p. 226) tell us what he would be doing when he'd be on top of you?

A. He was hurting down below.

Q. He was down below?

A. Yes.

Q. Okay. Do you remember when you were staying with Lewis and Cyndy after Halloween, or during Halloween? Do you remember that time?

A. Yes.

Q. Okay. Did any of the private touching happen to you then?

A. No.

Q. And do you remember telling - well, do you remember when you saw the private touching with Bobby and Laura and Kathy, what would Laura be doing?

A. She would be holding Kathy's leg and holding her mouth so she wouldn't scream.

Q. Okay. Now, when you're telling us about what you saw happen to Kathy, is that real, or is that pretend?

A. Real.

Q. Is that a lie?

A. (Witness shakes head.)

Q. When you tell us what happened with Bobby and Laura to you, is that pretend?

A. Um-hum.

Q. Is that - what did you say? Is that pretend or (p. 227) real?

A. That's real.

Q. Is it hard to talk about?

A. (Witness nods head.)

Q. You're doing really good. Did you ever see - when you saw this happen to Kathy did you see it happen more than once?

A. Yes.

Q. Did it - do you know - do you know how many five is?

A. Um-hum.

Q. How many is five? Can you show fingers?

A. (Witness complied.)

Q. Five. Did it happen five times?

A. Um-hum.

Q. Did it happen not as many as five times?

A. Huh-uh.

Q. Oh, okay. Did it happen more than five times?

A. Huh-uh.

Q. Are you getting tired?

A. (Witness nods head.)

Q. Okay. I just have two more questions, okay?

A. (Witness nods head.)

Q. Okay. Do you love your sister Kathy?

A. Yes.

(p. 228) Q. Good friends?

A. Yes.

Q. When did you ever see - do you remember telling Cyndy that you would bleed?

MR. HAYNES: Object as leading.

THE COURT: Overrule the objection.

Q. BY MR. NAYLOR: Is that hard to talk about, or did - or is that the truth?

A. Um-hum.

Q. Was it the truth when you told Cyndy?

A. Huh-uh - yeah.

Q. Well, was it real or pretend? Did it really happen?

A. Yes.

Q. Where would you bleed?

A. Down below.

MR. NAYLOR: Okay. You did really well, thanks. Can we take a short recess?

THE COURT: Take a brief recess.

(Jury out.)

MR. NAYLOR: Did you want to get a drink of water?

THE WITNESS: Huh-uh.

MR. NAYLOR: Your Honor, is there any problem with having her take a little break?

THE COURT: No. If she wants to go out in the hallway.

(p. 229) MR. HAYNES: Instruct her not to talk about testifying.

THE COURT: It should be understood that there will be no discussion about further testimony during this break.

MR. NAYLOR: Thank you, Your Honor.

THE COURT: Are you done questioning?

MR. NAYLOR: Yes, I am.

THE COURT: There is to be no discussion as to testimony then.

MR. NAYLOR: Okay.

THE COURT: Take a short recess.

(Recess taken.)

MR. NAYLOR: Your Honor. I have one matter. I'm not through on my direct.

THE COURT: Very well.

(Jury in.)

THE COURT: Counsel, will you waive roll call of the injury [sic]?

MR. HAYNES: Yes, Your Honor.

MR. NAYLOR: Yes, Your Honor.

THE COURT: Wish to proceed?

FURTHER DIRECT EXAMINATION

BY MR. NAYLOR:

Q. Jeannie, I just have a couple more questions (p. 230) you're doing really well, okay. Now, you said that Bobby would touch you down below. Okay.

A. (Witness nods head.)

Q. Do you remember telling Cyndy you used a different word for down below on Bobby?

A. (Witness nods head.)

Q. Can you tell me what that word is?

A. I can't.

Q. I know it's really hard, but you told Carol about that and you have told me about that before?

A. (Witness nods head.)

Q. And you just need to tell the Judge and these people today. Okay? What other word do you mean when you say down below?

A. I can't remember.

Q. Is it because you don't remember, or you don't want to say it?

A. I don't want to say it.

Q. I know this is hard for you, it's hard for me too, but we're doing it, right?

A. (Witness nods head.)

Q. Okay. Now, what's another word for down below?

A. I can't remember it.

Q. Do you remember telling Cyndy?

A. Yes.

(p. 231) Q. When you told Cyndy that word, was that the truth or a lie?

A. The truth.

Q. Will you tell me, is that word - would that be the same on a boy as it is on a girl? Do you know that?

A. (Witness nods head.)

Q. Jeannie?

A. What.

Q. Just a couple more questions, okay?

A. (Witness nods head.)

Q. Bobby would touch you down below, would he be touching you with something that is down below on him?

A. Huh-uh.

Q. Now, is that because it didn't happen? Can you tell me that, because it didn't happen -

A. (Witness nods head.)

Q. - or because you don't want to talk about it?

A. I don't want to talk about it.

Q. When you told Cyndy that, was that the truth?

A. (Witness nods head.)

Q. How old are you now?

A. Six.

Q. And how old were you when this private touching was happening?

A. Five.

(p. 232) Q. And do you know how old Kathy is now?

A. Yes.

Q. How old is Kathy?

A. Three.

Q. And how old was she when you saw Bobby and Laura touching her?

A. Two.

Q. Would your mother be there all the time?

A. Yes.

Q. Okay. Now, here is the last question.

A. Then I'm all done?

Q. With me, and then Landy, you remember Landy? You talked to Landy before, haven't you?

A. (Witness nods head.)

Q. Yeah, he's really nice. He's going to ask you some questions, okay? But I just have this last question. Okay?

A. (Witness nods head.)

Q. When you said that Bobby touched you with his - what was down below, what's that word that you told Cyndy?

A. I don't want to talk about that.

Q. Okay. I know it's really hard; this is the last question -

A. Then I'm all done.

Q. Yeah. Would – you just need to tell me that. I (p. 233) know it's really hard to talk about, but just tell me that word that you used, okay?

A. (Witness nods head.)

Q. What was that word?

A. I don't want to talk about it.

Q. Say it really fast, and then it will be all over.

A. I don't want to do that.

Q. Jeannie, I know this is hard for you. Is that – is the thing you're talking about that's down below, is that usually under clothes?

A. (Witness nods head.)

Q. And do you have that same thing?

A. Huh-uh.

Q. Do – are boys different than girls?

A. (Witness nods head.)

Q. And is that what makes them different –

A. (Witness nods head.)

Q. – that thing? And when you talked to – take a deep breath, that makes you feel better?

A. (Witness shakes head.)

Q. No, you don't want to do that either?

A. (Witness shakes head.)

MR. NAYLOR: Okay. Jeannie thanks, you've done really well, okay. Thank you. Now Landy wants to talk to you, okay?

(p. 234) A. (Witness nods head.)

CROSS EXAMINATION

BY MR. HAYNES:

Q. Hi, Jeannie.

A. Hi.

Q. Can I ask you a few questions too?

A. (Witness nods head.)

Q. Are you okay?

A. (Witness crying.)

THE COURT: Let's take a short recess.

MR. NAYLOR: Your Honor, would it be appropriate to have her therapist talk to Jeannie, not about testifying, but simply to calm her down?

THE COURT: Yes.

(Recess taken. Jury in.)

THE COURT: Counsel, wish to proceed?

MR. HAYNES: Your Honor, did you want to wait for Mr. Naylor?

MR. NAYLOR: I'm here.

MR. HAYNES: Sorry.

CROSS EXAMINATION

BY MR. HAYNES:

Q. Jeannie, I'm going to stand here so I can see (p. 235) you, is that okay?

A. Okay.

Q. Feeling better?

A. (Witness nods head.)

Q. Do you remember me?

A. (Witness nods head.)

Q. Do you remember where you met me?

A. (Witness nods head.)

Q. Where?

A. At Carol's office.

Q. Okay. Was anybody else with me?

A. (Witness nods head.)

Q. Do you remember who that was?

A. Kirt was there.

Q. All right. Okay. What made you cry just now, Jeannie? What are you feeling that made you cry?

A. Nothing.

Q. Okay. Can you tell me about it?

A. (Witness shakes head.)

Q. Are you afraid of something?

A. (Witness nods head.)

Q. What are you afraid of?

A. I'm scared.

Q. Okay. Who's Benae?

A. That's my friend.

(p. 236) Q. Does Benae work with Kirt?

A. (Witness nods head.)

Q. Okay. How many times have you talked with Benae about this?

A. A lot of times.

Q. A lot of times about the touching?

A. (Witness nods head.)

Q. Okay. How many times have you talked with Kirt about it?

A. A lot of times too.

Q. Okay. Did Kirt and Benae bring you to court another day?

A. Um-hum.

Q. Okay. What happened that day?

A. Nothing.

Q. What did you do here at court?

A. I had to talk to Kirt.

Q. Did you come into a courtroom?

A. (Witness nods head.)

Q. Were there people there?

A. (Witness shakes head.)

Q. No people. What did you talk to Kirt about in the courtroom?

A. About the touching.

Q. Okay. Did Benae help you with that?

(p. 237) A. (Witness shakes head.)

Q. Was Benae there?

A. (Witness nods head.)

Q. What did she do?

A. She just sit there and watched me.

Q. Okay. When you lived in the house in the picture with Bobby and Laura, who else lived with you?

A. Amy - not Amy, Kathy and me.

Q. Kathy and who?

A. And me.

Q. Okay. And would you go visit Lewis ever when you lived with Bobby and Laura?

A. (Witness nods head.)

Q. Did you sometimes leave Bobby and Laura to go visit Lewis?

A. (Witness shakes head.)

Q. You'd never go visit Lewis?

A. (Witness shakes head.)

Q. Would you ever live at Lewis and Cyndy's house?

A. (Witness nods head.)

Q. Do you remember the last day that you lived with Bobby and Laura?

A. (Witness shakes head.)

Q. Do you remember Lewis coming to get you that day?

A. (Witness nods head.)

(p. 238) Q. What happened when Lewis came to get you?

A. I can't remember.

Q. Okay. Is Lewis and Cyndy in the courtroom today?

A. (Witness nods head.)

Q. Are they sitting right over there?

A. (Witness nods head.)

Q. Do you not remember because you don't want to talk about it?

A. (Witness shakes head.)

Q. Is that a yes or no?

A. No.

Q. Okay. Now this private touching that you talked to Cyndy about. Did you tell it to Cyndy, or did Cyndy bring it up with you?

A. I told it to Cyndy.

Q. Okay. And what did she say?

A. She didn't say anything.

Q. Okay. Did she help you with any words?

A. (Witness nods head.)

Q. What words did she help you with?

A. She didn't - she helped me a little bit but she took me to the doctor.

Q. She did what?

A. They taken me to the doctor.

Q. Okay. How did she help you? How did she help (p. 239) you talk about it?

A. Nothing, but I had to tell her.

Q. Okay. Why did you have to tell her?

A. Because she wanted me to ask her.

Q. Okay, Jeannie, I'm having a hard time hearing you. I'm going to step over here a little closer, okay?

A. Okay.

Q. Why did you have to tell her?

A. Because she wanted me to.

Q. Okay. Did you have to tell Lewis about the touching?

A. Yeah.

Q. Why did you have to tell Lewis?

A. Because I wanted to.

Q. Okay. What did Lewis do when you told him about it?

A. Nothing.

Q. Okay. Then do you remember going to the doctors and the police officer being there?

A. Yeah.

Q. Who else was there?

A. Nobody else.

Q. Okay. Did you tell the doctors and police officers?

A. My dad was there.

(p. 240) Q. Is that Lewis or Bobby?

A. Lewis.

Q. Okay. What do you call Bobby? Is he Daddy Bobby?

A. He's not my dad.

Q. Have you ever called him Daddy Bobby?

A. Huh-uh.

Q. Never?

A. He's my sister's daddy.

Q. Okay.

A. Not mine.

Q. When you used to live there, did you used to call him Daddy Bobby?

A. (Witness shakes head.)

Q. All right. Is that true, that you did not call him that?

A. (Witness shakes head.)

Q. Okay. Do you every remember calling him Daddy Bobby?

A. (Witness shakes head.)

Q. What did you used to call him when you lived there?

A. Step daddy.

Q. Okay. When Bobby was supposed to come in and eat dinner and you would call him to come have dinner, what (p. 241) would you call him?

A. Step daddy.

Q. Okay. Okay. Did Lewis and Cyndy ever talk to you about Bobby?

A. (Witness shakes head.)

Q. Never ever talked to you? Do you remember them talking to you or do you not want to talk about it?

-A. I don't want to talk about it.

Q. Okay. Do you remember you and Cyndy talking about the touching with a tape recorder?

A. Yeah.

Q. Do you know what a tape recorder is?

A. Yes.

Q. What is it?

A. It types up everything you say.

Q. Could you hear yourself after you talked into the tape recorder?

A. (Witness nods head.)

Q. Did she have you talk about the touching into the tape recorder?

A. (Witness nods head.)

Q. All right. Did you get to hear your own voice then?

A. (Witness nods head.)

Q. Okay. Is that a yes?

(p. 242) A. (Witness nods head.)

Q. All right. Was that fun to hear your own voice?

A. (Witness nods head.)

Q. How many times did you get to hear your own voice?

A. One time.

Q. Okay. Did you every tell anybody that Bobby did not do those things to you, did not do private touching?

A. (Witness shakes head.)

Q. Was that because you were afraid to talk about it?

A. (Witness nods head.)

Q. Okay. What do you think would have happened to you if you had said "Bobby did not hurt me"?

A. What did you say?

Q. Okay. If you had told people "Bobby did not hurt me," would anything have happened to you?

A. No.

Q. Okay. When you said this touching would happen to Kathy, do you know how many times it would happen to Kathy?

A. Yes.

Q. Okay. How many?

A. Five.

Q. All right. Was it - could it have been as many (p. 243) as ten?

A. No.

Q. Could it have been once? Only once?

A. No.

Q. Couldn't have been only once? Did you see it every time?

A. No.

Q. Okay. How many times did you see it?

A. One time - no, two times I mean.

Q. One or two times?

A. Um-hum.

Q. Did you ever say that Ray - let me ask you who Ray Carlton is. Do you know him?

A. Yes.

Q. Who is he?

A. He's my friend.

Q. Do you remember when you used to visit him?

A. Um-hum.

Q. Where did you live then?

A. In that house.

Q. In the same house as in the picture?

A. (Witness nods head.)

Q. Do you remember living in a house right before that, another house?

A. No.

(p. 244) Q. Where did Ray live when you lived in the house in the picture?

A. In the trailer.

Q. Okay. Did he live across the street from you?

A. No, he lived a long way -

Q. All right?

A. - away.

Q. Did he ever live across the street from you?

A. No.

Q. Did you tell anyone that Ray did private touching on you?

A. Huh-uh.

Q. Did you ever talk about Ray and you to anybody else?

A. No.

Q. Did you ever talk to Linda or Deborah Hamby about Ray?

A. (Witness shakes head.)

Q. Can you remember?

A. Huh-uh.

Q. Did you ever talk to Cyndy or Lewis about Ray Carlton?

A. (Witness shakes head.)

Q. Did you ever talk to the police officers about Ray?

(p. 245) A. Yes.

Q. All right. What did you tell the police officers?

A. That the touching too.

Q. About Ray touching you too?

A. (Witness nods head.)

Q. What happened when Ray touched you?

A. He - it's hard to talk about it.

Q. Okay. Did you tell the police officers that Ray did the same things that Bobby did?

A. Yeah.

Q. Okay. Do you like Ray?

A. No.

Q. Was he a friend of yours?

A. No.

Q. Okay. Do you remember who Mrs. Nacano is?

A. Yes.

Q. Who was she? Who was Mrs. Nacano?

A. That was Lewis -

Q. You and Billy would go to her as a teacher. Was she your teacher too?

A. Yes, but, now, I'm not going there, I'm going to Whitney School.

Q. Who did you live with when Mrs. Nacano was your teacher?

(p. 246) A. Cyndy and Lewis.

Q. Okay. What boys live at Cyndy and Lewis's house?

A. Jared and Billy.

Q. How old are they?

A. I don't know how old Billy and Jared are.

Q. Are they older than you?

A. Jared is two and I don't know how old is Billy.

Q. Okay. Were there any other boys that would live there?

A. No.

Q. Any of Cyndy's boys?

A. (Witness shakes head.) Only those two boys.

Q. Only those two?

A. I got a brother that doesn't live with Lewis, doesn't live with Cyndy.

Q. Okay. How old is he?

A. He's two.

Q. Two years old?

A. No, I think one.

Q. All right.

A. And his name is Lewis like my dad's name.

Q. Were there ever any older boys, older than you that lived with Lewis and Cyndy?

A. Huh-uh.

Q. Okay. Is Billy your age?

(p. 247) A. I don't know how old.

Q. Did he go to your class in school?

A. Huh-uh.

Q. Oh -

A. He goes to his own school.

Q. Was he in the same class you were?

A. Yes.

Q. You had Mrs. Nacano?

A. (Witness nods head.)

Q. Okay. Did any boys at Lewis and Cyndy's house ever do any private touching with you?

A. (Witness shakes head.)

Q. Never?

A. (Witness shakes head.)

Q. Are you afraid to talk about that? Are you afraid to talk about that?

A. (Witness nods head.)

Q. Did you ever have any baby-sitters at Lewis and Cyndy's house?

A. (Witness shakes head.)

Q. Okay. Nobody would ever watch you while Cyndy and Lewis were gone?

A. Some people would.

Q. Okay. Do you remember their names?

A. (Witness shakes head.)

(p. 248) Q. Were they men?

A. (Witness shakes head.)

Q. Were they ladies?

A. (Witness nods head.)

Q. Ever remember a man being there named Chuck?

A. What? Was he our counseling service?

Q. I don't think so. I don't think so.

A. I don't know him.

Q. Okay. Okay. Do you like Cyndy?

A. (Witness nods head.)

Q. Have you always liked Cyndy?

A. (Witness nods head.)

Q. Have you ever told anybody that you don't like Cyndy?

A. (Witness shakes head.)

Q. Okay. If you are in trouble at Lewis and Cyndy's house, if you get in trouble what happens to you?

A. I'll get in trouble.

Q. Okay. What happens to you when you get in trouble?

A. I get spanken.

Q. With a hand?

A. (Witness nods head.)

Q. With a belt?

A. Sometimes I get spanked with a belt.

(p. 249) Q. Okay. Who would do that spanking?

A. My dad.

Q. And that's Lewis?

A. (Witness nods head.) Sometimes he will do it, but not most.

Q. I'm sorry, Jeannie, I didn't hear that. Sometimes what?

A. Sometimes he does it and sometimes he - he does a little bit, but he doesn't now.

Q. Okay. Would Cyndy ever spank you with a belt?

A. Huh-uh.

Q. Never?

A. (Witness shakes head.)

Q. Are you afraid to talk about that?

A. (Witness nods head.)

Q. Okay. When you would be living at Lewis's and Cyndy's house and then sometimes would you go back and live with Bobby and Laura?

A. (Witness nods head.)

Q. Would Lewis ever tell you to go home and say things to Bobby and Laura?

A. (Witness shakes head.)

Q. Okay. Maybe things that weren't very nice?

A. (Witness shakes head.)

Q. Do you remember any of those things?

(p. 250) A. (Witness shakes head.)

Q. Are you afraid to talk about those things?

A. (Witness nods head.)

Q. Okay. You do know who Carol is, right?

A. (Witness nods head.)

Q. You go and play with her and talk about things with her?

A. Yes.

Q. Is she in court here today too?

A. Yeah.

Q. Okay. Just a little while ago when these people went out into another room, who came up and hugged you?

A. Carol.

Q. Carol did. And was she telling you that you were doing a really good job?

A. (Witness nods head.)

Q. Okay. Did she tell you after I got to talk, ask you questions and talk with you, did she tell you that everything would be okay then?

A. (Witness nods head.)

Q. Okay. When you've talked with Carol about the touching, would she give you hugs then?

A. (Witness nods head.)

Q. Okay. Would she tell you you were doing a really good job when you talked about the touching?

(p. 251) A. (Witness nods head.)

Q. Okay. Did you ever tell her that the touching with Bobby that you've talked about, did you ever tell her that that really didn't happen?

A. What?

Q. Did you ever tell Carol that the touching with Bobby never really happened?

A. Huh-uh.

Q. Okay. Were you afraid to talk about that?

A. Come - (Witness nods head.)

Q. When you talked about the police and the doctors about the touching, was Lewis and Cyndy there?

A. (Witness nods head.)

Q. Did you tell the police and the doctors that it never really happened?

A. (Witness shakes head.)

Q. Were you afraid to talk about that?

A. (Witness nods head.)

Q. Did you ever talk with Kathy about the touching?

A. (Witness shakes head.)

Q. Okay. Did you ever - did you ever show her what happened to you, what you say has happened to you?

A. (Witness shakes head.)

Q. Has she ever talked with you about it?

A. (Witness shakes head.) She doesn't know how to (p. 252) talk about the touching.

Q. Okay. So, she - did she ever talk about Ray, Kathy?

A. (Witness shakes head.)

Q. Because she doesn't know how, is that why she doesn't talk about it?

A. (Witness nods head.)

Q. Okay. This is sort of an embarrassing word. Can I say sort of an embarrassing word?

A. (Witness nods head.)

Q. Do you know what the words French Kissing mean?

A. (Witness shakes head.)

Q. Have you ever talked to Linda about that, Linda Hamby?

A. (Witness shakes head.)

Q. Are you afraid to talk about that now?

A. (Witness nods head.)

Q. When you would use the word for private parts, there are certain words that you've used before. Do you remember those words?

A. (Witness shakes head.)

Q. Do you not just want to talk about them?

A. (Witness shakes head.)

Q. Are you embarrassed to say them?

A. (Witness nods head.)

(p. 253) Q. Who helped you with those words, the words that you don't want to say?

A. Nobody did.

Q. Did you just think them up all on your own?

A. (Witness nods head.)

Q. Is that when you talked with Cyndy about this?

A. (Witness nods head.)

MR. HAYNES: Okay. I don't have any other questions; thanks, Jeannie.

REDIRECT EXAMINATION

BY MR. NAYLOR:

Q. Jeannie, remember that tape recording that Landy asked you about?

A. Yes.

Q. You played with Cyndy when you talked into the tape recorder. Was that the truth or the lie?

A. The truth.

MR. NAYLOR: I don't have any other questions.

MR. HAYNES: No recross. Thank you.

THE COURT: Jeannie, you can step down. You're done, you can leave.

* * *

TESTIMONY OF DR. JOHN PHILLIP JAMBURA

(p. 354) JOHN PHILLIP JAMBURA,

a witness called on behalf of the Plaintiff, having been first duly sworn, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. NAYLOR:

Q. Would you state your full name and spell your last for the record?

(p. 355) A. John Phillip Jambura, J-a-m-b-u-r-a, M.D.

Q. What is your field of occupation or profession?

A. I am a general pediatrician practicing in Boise, Idaho.

Q. And what is your educational background?

A. After completing baccalureate [sic] study at Eastern Oregon State College I went to the University of Oregon Health Science Center School of Medicine. I graduated from that school in 1979 with the degree Doctor of Medicine, I then proceeded to the University of Kansas School of Medicine in Wichita where I served a three-year residency from 1979 to 1982. During that three years I spent extensive periods of time, both in educational sessions with the child abuse team, and also in active involvement in the examination and as a witness in a number of child abuse cases. I then proceeded to Boise in 1982, and since July of 1982 I have been in private

practice in Boise, Idaho where I have also had the opportunity to be involved in a number of child abuse cases.

Q. How long did you work with the child abuse team while you were at Kansas?

A. I was involved with the child abuse team at Wesley Medical Center virtually during my entire residency, from 1979 to 1982.

Q. So that was part of your specific training during (p. 356) that period of time?

A. That's correct.

Q. And during that period of time would you be able to estimate how many children you examined?

A. I made 6 court appearances and filed 12 reports which were indicative of approximately 50 children which I'd examined during that three-year period.

Q. So it's been your - it's been your experience to examine potential or suspected sexual abuse or physically abused victims and find no physical evidence?

A. It has.

Q. Are you a member of any professional fraternities or organizations?

A. I'm a member of the Ada County Medical Society, the Idaho Medical Association, I'm a member of the professional section of the American Diabetes Association.

Q. So your field of expertise is in pediatrics?

A. That's correct.

Q. Have you, since coming to Boise, then come in contact with suspected sexually or physically abused children?

A. I have.

Q. And on how many occasions, if you can recall?

A. Upwards of 100 occasions, I would say, in the last five years.

(p. 357) Q. Now, this may be a hard question, but is there, in your opinion, anyone else in the Ada County area that is as qualified, or more qualified in this area than yourself?

A. I would say there is one person and that would be Dr. Thomas Cornwall.

Q. Do you have a specific routine examination when you are examining a female child suspected of sexual abuse?

A. I do.

Q. And from what source, resource have you arrived at that routine?

A. I was trained in the routine examination of the female with possible physical or sexual abuse by my instructors in Kansas.

Q. Call your attention to November 9th, 1986. Were you called to Saint Alphonsus Hospital to consult with Dr. Mark Johnson and Dr. Bill Bayer?

A. I was.

Q. And did you examine a female child at that time?

A. I did.

MR. NAYLOR: May the Bailiff show the Witness State's Exhibit 2.

(Brief delay.)

Q. BY MR. NAYLOR: Do you recognize that picture?

A. I do.

Q. And is that the same person you examined on (p. 358) November 9th?

A. It is.

Q. Who else was present during that physical examination in the room?

A. There were - Dr. Johnson was present, there were one or two nurses and there were two people who identified themselves as her parents.

Q. And testifying here today, what reports are you relying upon?

A. I'm relying upon my dictated note of 9 November, 1986 on Jeannie M. Wright. I also have before me my dictated office notes of 11/10/86 on Kathy Wright and dictated office notes on 3/5/87 on both Jeannie and Kathy Wright.

Q. Now, on 3/5/87, that report, did you examine both children or just Jeannie Wright?

A. I have before me records of examinations on both children.

Q. Would you describe what, if anything, you found in your examination of Jeannie Wright on November 9th in respect to the anal area? And if it's helpful, and there's no objection, you might be able to use the paper behind you to diagram. There's a -

A. All right. As I look at my note from that day there are two things that I have recorded in my note. The (p. 359) first one is that the anal sphincter has a decreased wink, w-i-n-k.

To explain anal sphincter, normally when one strokes in an area around it, it will contract as a reflex action. This is what's known as the anal wink. If one notices a decreased anal wink it means that for some reason there has been an overriding of that normal reflex loop.

The second thing that I noticed was a somewhat corrugated appearance to the anal sphincter. Now, normal anal sphincter should have just a very sharp appearance as one looks at it. The anal sphincter as I saw it, and I am exaggerating this a little bit for the purposes of illustration. I use a broader line here, this is - if you can appreciate the fact that this is a bit rougher, if one were to blow this up even further one would see (indicating) the somewhat humped or corrugated appearance to the anal sphincter. This is suggestive of scarring and chronic trauma to the anal sphincter.

Q. Doctor, are you able to determine, from that examination, the aging of that scarring?

A. It's rather difficult to do in terms of how recent. One would probably say that at the very latest the last time that any trauma had occurred to the anus was six

weeks prior to that. It's more likely in the three to six week span because nothing - no acute trauma was noticed.

(p. 360) Q. And what would cause that type of trauma to the anal area?

A. While accidental trauma can cause these sorts of findings it's rather rare. The usual cause of such finding is nonaccidental trauma.

Q. For example?

A. Chronic sexual abuse or chronic physical abuse of that area in particular.

Q. And what type of instrument or object would be necessary to make that kind of trauma?

A. One could have chronic digital penetration, one could have chronic penile penetration, or one could use some sort of blunt object and chronically be penetrating the anus.

Q. By "digital penetration" you mean by finger penetration?

A. That's correct.

Q. Now, would a stool, a bowel movement cause that same type of trauma as you saw it in Jeannie?

A. It is highly unlikely.

Q. Why is that?

A. The - some more pictures for your benefit.

Q. You can just rip that.

A. If you could preserve that, we'll want to use that later. Thank you.

(p. 361) Now, final portion of the bowel, rectum, anus, (indicating). If one has a large bowel movement it will cause tearing forces which will be most marked at the point of least stretch at the anal sphincter, therefore there will be tearing here (indicating) and tearing here (indicating). There may also be some tearing circumferentially.

If that's torn it becomes even more sensitive than usual. First of all, that because it's more sensitive one will have an even tighter anal wink than usual. The skin around the anus will become hypersensitive to stimulation. Secondly, one will see jagged tears of skin, or if one examines the inside one will see some tearing and inflammation of the mucus lining, and one may also see some linear or horizontal tears of the mucus lining of the anus as opposed to the scarring that we see here. Secondly, if this indeed heals up it should heal without scarring.

Q. Okay. Thank you. Did you then examine the genital area of Jeannie?

A. I did.

Q. And what did you observe there?

A. On my examination of the genital area there were no lesions of the labia minora. May I have my previous drawing back? Put that here.

MR. NAYLOR: Perhaps we could mark those State's Exhibits 5 and 6 for illustrative purposes.

(p. 362) (State's Exhibits 5 and 6 marked for identification.)

THE WITNESS: On examination the labium majora which I'll mark with a capital M or the major lips, showed no bruises, no tears, no lesions at any point. The labium minora, which I'll mark with a small m were reddened and somewhat inflamed. The fourchette or the area of entry around the vagina was not swollen; however, one could not see a hymenal ridge in the hyman [sic] also known as in more common parlance as as [sic] the maden [sic] head the symbol of virginity which is broken during first sexual contact or it can also be broken by small trauma. On the back of the vagina some scarring which I list as synechiae in my report was noted.

Q. BY MR. NAYLOR: What type - and was that all you observed?

A. That is all that I observed at that time.

Q. Thank you. Now you said that the hymenal ring - you can go ahead and sit down, thank you. The hymenal ring may be broken by accident. What type of accident would cause that?

A. Many young girls that go horseback riding will rupture the hymenal ring while horseback riding, it can be ruptured by bicycle accidents where the child is jolted from the seat of the bike and comes down forcefully in the crotch area on the cross bar of the bicycle.

(p. 363) Q. So could that have possibly caused that trauma to Jeannie?

A. It's possible.

Q. Now, you indicated - well, based then on your observations, do you have any conclusion or opinion about whether Jeannie was sexually abused in the vaginal area?

A. The synechiae or scarring in the back area of the vagina is strongly suggestive of that.

Q. Okay. What is that?

A. The scarring in the vaginal area, the absence of a hymenal ring is very unusual. The accidental means of disruption or rupture of the hymen do not cause residual scarring. The residual scarring tends to be an after effect of some sort of vaginal penetration on a continuing basis.

Q. And is that what you encountered in Jeannie's case?

A. That is correct.

Q. Do you have an opinion whether there was a continued penetration to the vaginal area?

A. On the basis of the reddening and inflammation of the labia minora, it is possible that acute penetration had occurred.

Q. And was there evidence of any chronic sexual abuse?

A. The scarring in the back of the vagina, as well (p. 364) as the corrugated appearance of the anal sphincter

and its decreased anal wink, both strongly suggest chronic sexual abuse.

Q. Now, the scarring in the hymenal ring in the vaginal area. Can you tell us approximately how long it takes for this scarring that you observed to form? Was there any dating process available?

A. We usually use the process of wound healing, which has been well documented to discuss these sorts of things. It takes six weeks to form a mature scar. The scar that was found in the posterior area was not completely mature as yet. So one could give some approximate dating in the realm of, say, two to three weeks.

Q. Now, as far as chronic, is there any indication - is there any way to tell whether abuse has been occurring over a month's period of time?

A. By that do you mean occurring over the period of 30 days, or over the period of many 30-day periods?

Q. Well, you saw Jeannie on November 9th. Was there any evidence, physical evidence, that you observed that would indicate to you that the sexual abuse, the chronically occurring sexual penetration to the vaginal area had been occurring frequently?

A. From my examination I - I think it's highly possible that vaginal penetration had been occurring on a (p. 365) relatively regular basis.

Q. When you say "relatively regular" what do you mean by that?

A. I would say more than once a week.

Q. And over what period of time?

A. I would have to say over a period of weeks. I could not give you a definite number of weeks.

Q. Was there indications from the scarring - does the scarring take - some scarring take three to six months to heal?

A. That's correct. It takes three to six months to form a mature scar which is more fully integrated into the surrounding tissue.

Q. And did you find evidence of such scarring in the vaginal area of Jeannie Wright?

A. I did not.

Q. And when you say penetration of the vaginal area, what type of abuse would that - would cause that trauma?

A. Again one could have either chronic digital penetration or chronic penile penetration.

Q. What did you find when you examined Jeannie Wright again on March 5th, 1987?

A. At that time she had marked improvement of the anal wink, the anal sphincter had healed considerably and appeared much less corrugated. The synechial scar - a (p. 366) synechial scar on the anal sphincter had matured and the genital examine [sic] was remarkable only for a small amount of scarring in the back of the vagina.

Q. And what did that indicate to you?

A. That indicated that, A, substantial healing had taken place of the injuries I had previously seen, and B I

would find it unlikely that much, if any, other penetration had occurred of either the vagina or the anus.

Q. Now, do you have an opinion as to the outside – based on your examination on November 9th when the – was there any indication of when the earliest abuse had occurred to the vaginal area?

MR. HAYNES: When was the first time that she had been abused?

MR. NAYLOR: Yes, sir, the most remote. From the most remote time, from the time that you examined her on November 9th? Do you need –

THE WITNESS: Could you rephrase that for me?

Q. BY MR. NAYLOR: What evidence, if any, led you to any conclusion of – or opinion as to when the – oh, well, the oldest scarring I guess is what I'm saying, the oldest scarring that was present indicate? You said that some scarring takes three to six months, and was there any indication of that type of a period of time since some trauma had occurred, three to six months?

(p. 367) A. No.

MR. HAYNES: May I ask a question in aid of objection?

THE COURT: Very well.

MR. HAYNES: Can you answer that question about when this particular subject was first traumatized in the vaginal area with any medical certainty?

THE WITNESS: As to the first date?

MR. HAYNES: The first time, I think that was Counsel's question, can you date when she was first traumatized if in fact she was? Can you answer that with any degree of medical certainty?

THE WITNESS: No, sir I cannot.

MR. HAYNES: I'll object to the question, Your Honor.

THE COURT: I think he already said that he couldn't in answer to the earlier question. Sustain the objection but the answer is in.

MR. HAYNES: Thank you.

Q. BY MR. NAYLOR: Was there anything remarkable about the size of the opening of the vaginal area for a five-year-old?

A. Would I say that qualitatively it did appear larger than the average five-year-old's vaginal opening quantitatively I did not measure it.

Q. Were you able to form an opinion from that?

A. I was.

(p. 368) Q. And as to any sexual abuse what would that opinion be?

A. I would say that again there's – it would create a strong suspicion that sexual abuse had occurred.

Q. Now, as to Kathy Wright – perhaps would the Bailiff show Dr. Jambura State's Exhibit 3.

(Brief delay.)

Q. BY MR. NAYLOR: Do you recognize that picture?

A. I do, sir.

Q. Okay. And did you examine her on November 10th, 1986?

A. Indeed I did, sir.

Q. Do you recall where that was?

A. I recall that it was in my office.

Q. Was anyone else present?

A. There was a female attendant, I do not recall her identity and myself and the child. As I recall, her sister was not there during that time.

Q. And what type of exam did you perform on Kathy?

A. I examined her genital area as well as her anal, rectal area.

Q. And what did you find in the anal area?

A. The anal area showed no scarring or other sort of lesions, and she had normal sphincter tone on rectal examination.

(p. 369) Q. And what, if any, opinion were you able to formulate from that examination?

A. From that examination I think it's highly unlikely that any nonaccidental trauma had occurred to the anal area.

Q. And turning then to the genital exam. What did you find at that time?

A. She had some redness and some bruises that were in the early stage of healing on the inner surface of the labium majora and the labium minora, there was some scarring in the back portion of the vagina as we've mentioned - or as we've discussed previously. The healing area around the vagina was inflamed and swollen.

Q. Do you recall anything unusual about the hymenal ring?

A. I do not.

Q. Okay. Based on those observations, were you able to form an opinion as to whether there was sexual abuse in the vaginal area?

A. The examination was strongly suggestive of sexual abuse with vaginal contact.

Q. Why is that?

A. The bruising of both sides of the labia, the inflammation and swelling and scarring of the fourchette, of the area around the vagina, and the small area of scarring (p. 370) in the back of the vagina.

Q. And what does that scarring - and when you say scarring you meaning that healing process?

A. The healing process that we were talking about before.

Q. And the bruises in that area, what does that indicate? What type of force would cause that type of a bruising in that area?

A. Well, the bruising of the inner surfaces of both labia suggests that forceful contact was made with the

inner genital area as opposed to external trauma, such as one might experience riding a horse, or falling off a bicycle.

Q. So you're saying that actual penetration of the vaginal area caused that bruising?

A. The process of penetration may have caused that bruising. The bruising to the labia. The penetration itself may very well have caused the area of injury around the entrance area or fourchette of the vagina itself.

Q. So in your experience is it common to find - or how easy is it to break that labia minora, the inner part?

A. It is very difficult to bruise the labium minora. That's one - oh, that's part of the design of the female genital system, the labia majora act as a shock absorber for the genital region to prevent trauma from occurring to the external genitalia.

(p. 371) Q. Do you have an opinion as to how recent the trauma that you observed in that examination to the vaginal area had occurred?

A. I do.

Q. And what is that opinion?

A. It's my opinion that trauma occurred approximately two to three days prior to the examination.

Q. Where you able to ascertain whether there was any chronic abuse, ongoing abuse to that area?

A. In light of the acute injuries, chronic findings may have been masked by swelling, inflammation and bruising from the acute injuries, therefore it was very

difficult to ascertain whether chronic abuse had been occurring.

Q. So would that be able to be ruled out?

A. No, it would not.

Q. And you indicated that you had examined Kathy on a separate occasion. Do you have notes to that effect?

A. I have my office note where I had examined Kathy on - again on 3/5/87.

Q. And what did you find at that time?

A. The labia majora and minora had no bruises or redness. The vaginal fourchette appeared to be within normal limits, and the rectal examination was completely normal with no scarring, lesions, et cetera in the area around the anus, and there was a very small area of adhesion (p. 372) or perhaps scarring between the labia minora.

Q. And that did that indicate to you? Do you have an opinion as to what that indicated?

A. Yes, I do have an opinion.

Q. What is that opinion?

A. It is my opinion that this indicates that substantial healing had taken place of the injuries which I had noted on 11/10/86, and that it was highly probable that no further trauma had occurred to the area in question.

Q. Now, did you, in your examination of Kathy on the 10th of November, did you have occasion - did she make any statement concerning her injuries?

MY. HAYNES: I think I'll object. This may be something that should come out in camera.

THE COURT: If you will take the jury out, please.

(Jury out.)

MR. HAYNES: Your Honor, I'm going to object to any hearsay statements made by Kathy to this witness. I don't think there's any hearsay exception that allows it unless it's pertinent directly to diagnosis of medical trauma, maybe that exception, and I have specific exceptions under the statute, 19-3024.

Basically, Your Honor, I'm objecting, she's not a competent person to testify. If she's not competent in court today to be cross-examined, she is not competent just (p. 373) because an adult repeats what she says. The source, original source, Kathy is not competent by ruling of this Court, and I don't think it should come in through any other source either. There's no indicia of reliability at all as of now.

THE COURT: Did you wish to respond?

MR. NAYLOR: Your Honor, first of all I believe that the statements to the doctor could be admitted under the hearsay exception for medical diagnosis. As to the incompetency of Kathy, in State versus Bouchard, 31 Washington Appellate Court, 381, 639 P.2d at 761 in 1982; that court held that the attending physician was allowed to testify that a three-year-old child brought to him for treatment of a perforated hymen told him grandpa did it.

In this case, as an offer of proof, the statements made to Dr. Jambura will indicate not only the nature and the source of the trauma going to his diagnosis of the

physical observations that he formulated, but I believe where Defense Counsel is going to is the identification of the perpetrator of that. The Statements that she made as far as being hurt in that area caused by another person go to benefit the doctor in his formulating a medical opinion and for her strength - excuse me, for his - the strength of his determination.

Also in that case, State versus Bouchard, citing (p. 374) Johnson versus Olds three [sic] - 457 P. 2d 194 a 1969 case. In that case the Court held that the declarant herself, an infant, was determined to be incompetent to testify; however, that that [sic] I can see to testify did not prohibit the use of her excited utterances from another exclusion to the hearsay rule under the rules of evidence. And therefore relying upon that and the logic there that based on the statements made to Dr. Jambura, the credibility of those statements would be - would go to weight and credibility that the jury would be - as fact finders would make the final determination. So relying upon 803-84 that the statements indicate the cause of, or external source of the injury for a necessary proper treatment, as well as the fact that those statements, as determined by the jury would be able to make the best determination of their credibility.

THE COURT: Did you wish to respond?

MR. HAYNES: Yes. Two areas, Your Honor. In the area of whether this statement of who the perpetrator is, is admissible under the medical diagnosis or under some exception to the hearsay rule. I would first remark that the reason for that rule, as I understand it, is that a person is unlikely to be misleading to a physician about

injury because they want to be healed. That has nothing to do with who the perpetrator is, a person, there's no indicia of reliability on who the perpetrator is, that they would (p. 375) reveal to a doctor or their injuries. I think any statements she made about her injury, about physical discomfort, about pain is to the furtherance of diagnosis. Who did this to her does not further the diagnosis at all. It doesn't matter who did this to her, for the doctor's purposes of diagnosing whether she was sexually abused. So I don't think it's covered under that.

Similarly, Your Honor, I would cite a 4th Circuit case, cite *Ellison versus Sachs* at 769 et seq. 955, 4th Circuit, 1985.

In that particular case a five-year-old girl was declared incompetent by the State trial court. Your Honor, the court allowed, however, a police officer to testify that the child had told him that she had been sexually assaulted and that the defendant was the perpetrator. Maryland Appellate Court upheld that, but the 4th Circuit overturned that holding that it was the constitutional error to admit the testimony of the officer concerning the child's statements in a unanimous decision they found that the victim's out-of-court identification and statement were not reliable and therefore held that the admission of hearsay violated *Ellison's* 6th Amendment right to confront witnesses; especially, [sic]

Your Honor, where the sole evidence of the perpetrator is the out-of-court statement. And in this instance I think (p. 376) the sole evidence of the perpetrator here has come from, in this particular instance, Kathy to Dr. Jambura. If

he's allowed to say that, with some corroboration by Jeannie, whatever weight is given to that.

So, Your Honor, I think it is denying us the 6th Amendment right of confrontation, and effective confrontation for this witness to relate what an incompetent witness has told him, especially when there's no indicia of specific training as an interviewer, no indicia of reliability at all around the circumstances when the statements were made. And so for those two reasons I think this should be disallowed, no real exception for the perpetrator under the hearsay rules, and the incompetency of the witness does not make her out of state [sic] – just because she's made an out of state [sic] comment, the fact that she's incompetent and adult can repeat that does not allow it, even under 1930.4.

THE COURT: In the Maryland case was there physical evidence of sexual abuse also present?

MR. HAYNES: Your Honor, I don't think I know. I will find out for you though, but I don't know if there was also physical evidence of sexual abuse.

THE COURT: Do you have a copy of the decision there?

MR. HAYNES: Your Honor, I just have a – I can't think of the word for it, it's part of an article that I've (p. 377) read. I don't have a copy of that either. I just have the article. I've read the decision, I do not have a copy with me, Your Honor. I don't recall, frankly, whether there was evidence of – medical evidence of abuse.

THE COURT: Did you wish to respond?

MR. NAYLOR: No, Your Honor.

THE COURT: Do you, by any chance, have a copy of the decision?

MR. NAYLOR: No, I don't believe we have the federal supplement in our library.

THE COURT: Let's take a short recess and see if we can determine that 769 Fed. 2d 955?

MS. MEEHAN: Judge it's possible if it's that important I can run over there.

THE COURT: Appreciate it if you would, thank you.

(Recess taken.)

THE COURT: In reviewing the case of State versus - Ellison versus Sachs I think probably the best way to summarize it is to read significant aspects of it. To begin on Page 957 at the first full paragraph says, "Here however, as the district court documented in careful detail, there are serious discrepancies which indicate that the victim's out-of-court statements and identification of Ellison were not at all reliable. The obvious limitations in observation expression and understanding of a five year old help explain (p. 378) the various discrepancies in her descriptions. But they also underscore the care with which courts must approach the question of introducing such hearsay, particularly when largely untested by cross-examination.

"In contrast to the identification itself we find no 'inherent unreliability' in the victim's out-of-court statement corroborated by physical evidence that a sexual assault occurred. Indeed, several courts and commentators have observed that a young child's description of a

sexual assault may, in particular circumstances, contain its own inherent verity." citing authorities.

"Here, we have no occasion to chart the instances where such hearsay might contain its own particular guarantee of trustworthiness. It is controlling, however, to note in the present case that where her identification was the sole evidence of the perpetrator's identity, the victim's testimony contained no sufficient assurance of accuracy."

It's unfortunate that the Court in that case did not detail enough facts to really help us much, but there are some things that can be gleaned from this limited federal court opinion.

I don't think it is expressed, but I think it is apparent that the Court was dealing with Rule 803 under our Rule Sub 24 "Other Exceptions" to hearsay. I'll simply read (p. 379) that portion of the Rule into the record so that there is an understanding of what I'm talking about. "Other exceptions: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantee of trustworthiness, if the Court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence." Continues, "However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide

the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and particulars of it, including the name and address of the declarant."

The sole issue that concerned the Court in the Ellison case concerning the out-of-court statements relates to identification. Unfortunately the federal court does not give us the benefit of telling us, I don't believe, and I've only had a few minutes to read this case since it was just cited, whether the defendant was known to the victim or not.

(p. 380) I gather, since identification was an issue that it's a fair assumption that the defendant was not related to the victim or otherwise in a situation to be well known by the victim.

It is significant, I think, that where there was other evidence to support the reliability of the out of state - or out-of-court statements, that the federal court found no imparity in allowing those statements, they were corroborated by physical evidence, and, therefore, those statements apparently complete the reliability test, inherent reliability test pronounced by the Court.

The Sixth Amendment right to confrontation is clearly not absolute, as is apparent from other exceptions to the hearsay rule, which have been upheld, and as clear from the ruling of the Ellison case itself. In that case as to identification I found that the problem was the sole evidence of the perpetrator's identity was the statement of the child. In this case I'll simply analyze briefly what other indicia of reliability there may or may not exist.

First, I will comment that I do not think that the ruling of incompetency [sic] to testify in court is preclusive of admission of statements out-of-court if they meet the reliability test. In this case, of course, there is physical evidence to corroborate that sexual abuse occurred. It also would seem to be the case that there is (p. 381) no motive to make up a story of this nature in a child of these years. We're not talking about a pubescent youth who may fantasize. The nature of the statements themselves as to sexual abuse are such that they fall outside the general believability that a child could make them up or would make them up. This is simply not the type of statement, I believe, that one would expect a child to fabricate.

We come then to the identification itself. Are there any indicia of reliability as to identification? From the doctor's testimony it appears that the injuries testified to occurred at the time that the victim was in the custody of the Defendants. The sister Jeannie has testified as to identification of perpetrators. Those - the identification of the perpetrators in this case are persons well known to the child Kathy. This is not a case in which a child is called upon to identify a stranger or a person with whom they would have no knowledge of their identify or ability to recollect and recall. Those factors are sufficient indicia of reliability to permit the admission of the statements. It's then up to the jury to determine if they are sufficiently reliable to give weight to, in their determinations, and will overrule the objection.

MR. HAYNES: Your Honor, may I be allowed to make a further record with respect to the few questions of this witness regarding reliability?

(p. 382) THE COURT: Very well.

MR. HAYNES: Thank you.

VOIR DIRE EXAMINATION

BY MR HAYNES:

Q. Dr. Jambura, specifically you asked questions of Kathy to gain information from her?

A. That's true.

Q. And the questions - I see four in your report of 11/10. Do they include, or were the questions, "Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? And do you touch his pee-pee?" Were those the four questions that you recall asking?

A. Those are four of the questions I recall asking, and so recorded in my note.

Q. All right. Did you elucidate, I guess, or expound on what you mean by "play with daddy"?

A. I asked that question as an open-ended question because it could be, you know, I wanted to see what her response would be. You know, play baseball, throw the ball back and forth, you know, allow her to respond to that. So that as a general open-ended question to see where she would go with it.

Q. That's sort of a yes or no question. How did you determine that to be open-ended?

(p. 383) A. I look at that as being open-ended because most of the children, if I asked them that question, don't just say yes or no. Children of Kathy's age when you given them a question like that tend to take any opportunity to run with the conversation.

Q. What training do you have in interviewing?

A. Well, first of all as every pediatric resident is trained how to interview, and, you know, talk with children to get information out of them of all sorts. Number two, had the specific training from the child abuse team in Wichita. Number three, I've talked to children every day for the - about the last eight years.

Q. Is that to gather diagnosis, data?

A. Besides just talking to them.

Q. Okay. Did you determine if Kathy knew what pee-pee meant?

A. Yes.

Q. Okay. What did she say?

A. Well, I drew her a picture and she drew a picture of the penis and she said yes and then we said - we also determined that pee-pee was the word that was used for genital area.

Q. Okay.

A. With her as well.

Q. Do you have that picture?

(p. 384) A. I do not. It was drawn on my examining table and then rolled up and thrown away.

Q. Okay. And you don't have that reflected in your notes of her identifying pee-pee on a picture, do you?

A. No, sir.

Q. And she would not give you any information regarding the exact method of being touched, exact method of sexual contact, right?

A. That's correct.

Q. Okay. Along another line then. Does - did it assist your diagnosis to know who the perpetrator was and assist your examination?

A. Pardon me for pondering that one, Counselor. I'm trying to gather exactly what you're asking.

Q. Did it help you to know that daddy touched me as opposed too any man touched me, or had sexual contact with me? Did the identity of daddy assist your diagnosis in any way?

A. To the extent that one usually sees sexual abuse taking place among family members, yes.

Q. Okay. Did it assist your medical diagnosis that sexual abuse took place as opposed to a determination that daddy was the perpetrator? In other words, could you have come to the same conclusion and done the same examination without Kathy naming daddy, the same conclusion that she had (p. 385) been sexually offended against?

A. I could have come to a similar conclusion but with less weight.

Q. How did daddy add weight to the medical observations?

A. It again reflects back on the thought that non-accidental trauma is more likely in the realm of the family member than the non-family member; that the additional information that a family member may have been involved makes one think in realms - in the realms of relative probability.

Q. What would your opinion have been, can you say, if daddy had not been mentioned?

A. For example if she - I had none of this history and a negative discussion with the child?

Q. No. Just in terms of no discussion with the child?

A. Again I would have said - again it's the realm - it's not so much a qualitative difference of sexual abuse versus no sexual abuse, but of a quantitative difference of how strongly I would - how strong my opinion would be in that regard.

Q. All right.

MR. HAYNES: That's all the record. Thank you.

THE COURT: I guess I should specify, if I haven't, (p. 386) that sub 24 of 803 requires that it is of equivalent circumstantial guarantees of trustworthiness as areas covered through in the preceding sections, and under the circumstances of this case there, at least as trustworthiness as, for example, sub 2 excited utterance, sub 3 then existing mental emotional or physical condition. I think probably a sub 11, sub 12, sub 13, sub 20, sub 19, sub 21.

Bring the jury back in, please.

(Jury in.)

THE COURT: Wish to proceed? Waive roll call of the jury?

MR. NAYLOR: Yes, Your Honor.

MR. HAYNES: Yes, Your Honor

FURTHER DIRECT EXAMINATION

BY MR. NAYLOR:

Q. Backtrack just briefly. What type of training or experience have you had in the area of interviewing children?

A. First of all, I had the usual and customary training of all individuals who go through pediatric residency in interviewing children, eliciting information of all sorts from them. Number two, I had specific training from interviewing during my educational sessions with the (p. 387) child abuse team in Wichita, Kansas. Number three of being - talking to children practically every day for the last eight years. And there's - applying those principles to my day to day contact with children both in a professional and a nonprofessional circumstance.

Q. And what are the ages that you tend to have children - do you tend to speak with?

A. Well, I have been known to speak with infants, I speak with toddlers, small children, medium size children. I have been known to even speak with adolescents, and they occasionally speak to me.

Q. Do you find it easy to speak with children and interview them?

A. I find it incredibly easy to talk with children and interview them.

Q. Now, calling your attention then to your examination of Kathy Wright on November 10th. What - would you describe any interview dialogue that you had with Kathy at that time? Excuse me, before you get into that, would you lay a setting of where this took place and who else might have been present?

A. This took place in my office, in my examining room, and, as I recall, I believe previous testimony I said that I recall a female attendant being present, I don't recall her identity.

(p. 388) I started out with basically, "Hi, how are you," you know, "What did you have for breakfast this morning?" Essentially a few minutes of just sort of chitchat.

Q. Was there response from Kathy to that first - those first questions?

A. There was. She started to carry on a very relaxed animated conversation. I then proceeded to just gently start asking questions about, "Well, how are things at home," you know, those sorts. Gently moving into the domestic situation and then moved into four questions in particular, as I reflected in my records, "Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?" And again we then established what was meant by pee-pee, it was a generic term for genital area.

Q. Before you get into that, what was, as best you recollect, what was her response to the question "Do you play with daddy?"

A. Yes, we play - I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

Q. And "Does daddy play with you?" Was there any response?

A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed (p. 389) very unaffected by the question.

Q. And then what did you say and her response?

A. When I asked her "Does daddy touch you with his pee-pee," she did admit to that. When I asked, "Do you touch his pee-pee," she did not have any response.

Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?

A. Yes.

Q. What did you observe?

A. She would not - oh, she did not talk any further about that. She would not elucidate what exactly - what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.

Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?

A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur.

MR. NAYLOR: Thank you I have nothing further.

(P. 390) CROSS-EXAMINATION

BY MR. HAYNES:

Q. How long, Doctor, will the reddening and inflammation in the labia majora and minora last after trauma?

A. You're referring to the exam of Kathy Wright on 11/10/86?

Q. More to the exam of Jeannie on 11/9, but in general?

A. Okay.

Q. What does the redness indicate to you about time?

A. That indicates to me that it's usually happened within one to three days. There was, in the particular case of Kathy, there had been some mild resolution of the reddening without some swelling. So I put it more precisely to two or three days.

Q. Okay. Now, did you make dictated notes on this discussion with Kathy on November 10, '86?

A. I made a dictated note summarizing the conversation but not putting it down in excruciating detail.

Q. What types of things did you choose to note, the important things?

A. I try to note an overview of the conversation that would allow me to recollect it in a situation such as this, with specifics of questions that would be particularly (p. 391) pertinent.

Q. And pertinent responses?

A. That's correct.

Q. All right. You don't have the picture that was drawn any more, where you essentially drew a male figure with genitalia attached?

A. That's correct.

Q. It was thrown away?

A. It is.

Q. Unretrievable at this point? It's not stored at your office?

A. No, it is not stored at my office somewhere. It's gone with the trash.

Q. All right. And of the pertinent responses that you chose to note, am I correct that you did not note that the child's attitude in any way changed with specific questioning?

A. My note does not reflect any change in the child's affect or attitude.

Q. Okay. Now your testimony today is that your examination of Kathy is strongly suggestive of sexual trauma?

A. That's correct.

Q. Did you write that same terminology on November 10?

(p. 392) A. On November 10th I wrote, "Probable sexual abuse on this child reason corroboration is also distinguished from historical evidence from her sister."

Q. Did you also put in the line above that "Suggesting possible sexual contact approximately two to three days ago."

A. That is correct.

MR. HAYNES: Thank you. No further questions [sic]

REDIRECT EXAMINATION

BY MR. NAYLOR:

Q. Did you make a report of your examination and the statement, some of the statements that you've made here that Kathy made on November 10th, 1986?

A. I did.

Q. And in that report did you indicate some statement in paren that "see quotation marks" excuse me?

A. I did.

Q. What was the purpose for noting those quotation marks?

A. So that I could give an exact quotation of what was said at that point.

Q. In that report, other than the four questions that you've already testified to, is it true that in quotes are the words "her father's pee" end quote?

(p. 393) A. Yes.

Q. As well as quote "Daddy did this a lot more with her sister than with herself" end quote?

A. That's correct.

MR. NAYLOR: Nothing further.

MR. HAYNES: Yes.

RECROSS EXAMINATION

BY MR. HAYNES:

Q. Before you interviewed Kathy, had you already interviewed Jeannie?

A. I had not interviewed Jeannie, no.

Q. Okay. When you interviewed Kathy, did you have a preconceived idea that sexual abuse had occurred on Kathy?

A. That's a difficult one for me to answer, Counselor. Pardon me for taking a moment.

Q. Had Jeannie told you about it on the ninth?

A. No. When I had gotten Jeannie two other physicians had interviewed her and she was not in the most communicative state.

Q. Okay.

A. I did not feel it was appropriate to pester her with questions.

Q. Okay. Can I glean from your questions that you asked specially questions regarding daddy's pee-pee that (p. 394) that was at least a concern in your questioning that daddy was an offender?

A. May I answer your question in somewhat indirect fashion, Counselor? As I think here, let me try to reconstruct for you, as best I can, the thoughts that were going through my mind when I interviewed Kathy Wright.

I had seen Jeannie the day before. And I had an exam in my mind that said, "hum, possible sexual abuse." Now, I also said to myself, "Hey, there's always the possibility that this may not have happened." Therefore, to the best of my ability I have to - I'm trying to give you my internalizations here.

I have to remove from my mind as much bias as possible, or at least negate it, so I can just approach this child with - and try to do it with a blank mental slate. You sort of go through the systematic way of doing things that I know how to do and let the results fall out as they may. So, in as far as any human being imperfect as we are is capable of being objective, I made every effort to force myself to be objective in that interview.

Q. So in your objectivity then you specifically named - asked about daddy, you played with daddy's pee-pee, right?

A. That's correct.

Q. Did you ask about Lewis's pee-pee?

(p. 395) A. I didn't use the term Lewis. I used the generic term daddy.

Q. Okay. Did you ask about any babysitter's pee-pee?

A. I did not.

Q. Did you ask about grandpa's pee-pee?

A. I did not.

Q. Did you ask about a neighbor's pee-pee?

A. I did not.

MR. HAYNES: I have no further questions.

MR. NAYLOR: Just one.

FURTHER REDIRECT EXAMINATION

BY MR. NAYLOR:

Q. When you say possible or probable sexual abuse on Kathy Wright from your November 10th examination, what do you mean by possible? How sure are you, Doctor, of that abuse?

A. My note on 11/10/86 reflects a flow of thought as I was going through the examination. At the point in which I was looking at the fourchette, I look at the fourchette, I am noticing that it's swollen and inflamed and the first thing that goes through my head is the possibility of sexual abuse exists here. I pass by that, continue the exam, finish it. I then come to the point in time where I sit (p. 396) down, sift the evidence and say, "Given what I see here and given, you know, my experience and medical judgment what's my assessment of this

situation?"? [sic] At that point given that flow of events I then say it is probable, probable to me being equal to strongly suspicious that sexual abuse may have taken place.

Q. Do you have a stronger phrase that you would use if you felt stronger about that?

A. I would apply modifiers to the probable saying such things as very probable, highly probable.

MR. NAYLOR: Okay. Thank you.

MR. HAYNES: Nothing more, Your Honor.

THE COURT: You may step down.

MR. NAYLOR: Is this a witness that may be excused?

THE COURT: Any objection?

MR. HAYNES: No.

THE COURT: You're free to go if you wish to.

* * *

TESTIMONY OF STEPHEN DAVID THURBER

(p. 738) STEPHEN DAVID THURBER,

a witness called on behalf of the Defendants, having been first duly sworn, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. HAYNES:

Q. Sir, will you please state your name and spell your last name?

A. Steven David Thurber, T-h-u-r-b-e-r.

Q. And where do you live and what town?

(p. 739) A. Live in Boise.

Q. How long have you been in this area?

A. About 16 years.

Q. What is your occupation at this time?

A. I'm a licensed clinical child psychologist. I'm director of clinical programming at Northwest Passages Adolescent Hospital.

Q. What education did you gather to allow you to conduct this type of an occupation?

A. I have Bachelor of Science and Master of Science degrees from Brigham Young University, I have a Ph.D. degree from the University of Texas at Austin. My program at the University of Texas was sponsored by the National Institute of Mental Health, was approved by the American Psychological Association. Also had a predoctoral internship in the Austin Child Guidance Center, working with children having a variety of emotional and

behavioral disorders. I have two postdoctoral diplomas, one in early child development from the University of Minnesota, covering intensively the first five years of development. I have another diploma, postdoctorally from the University of Oklahoma Medical School in child clinical and pediatric psychology.

I'm a member of American Psychological [sic] Association, full member of the Division of Clinical Psychology, full member of the Section on Child Clinical (p. 740) Psychology, full member of the Society of Pediatric Psychology of the American Psychological Association. I have published something beyond 40 research articles and books in the field of psychology, mainly having to do with the evaluation and treatment of children. Latest book is a case book in Child Clinical Pediatric Psychology published by Gilford Press in New York City where among other thing we deal with problems of assessments of treatment of children who have been sexually abused.

Q. What has your work experience been beyond the Northwest Passages Hospital right now?

A. I've been director of psychological services at Raleigh Hills Hospital for chemically dependent individuals, been director of treatment programs at the Intermountain Hospital Psychiatric Hospital.

Q. Did you have occasion with connection - in connection with this case to review the written psychological evaluation of one Jeannie Wright compiled by a Dr. Eisenbeiss?

A. Yes, I did.

Q. And that was at the instigation of my office to look that report over?

A. That's correct.

Q. With respect to the report as you viewed it on an intelligence test for Jeannie, what did you understand her (p. 741) intelligence to be in relation to her chronological age?

A. She's been administered the Peabody Picture Vocabulary Test, as I recall, and the findings indicated a mental age that was below her chronological age, several months below as I remember.

Q. All right. If I assert to you that it was four years one month when she was chronologically five years eight months, does that sound right?

A. Sounds right.

Q. What does that, and based on your experience, especially your intensive study of children one to five in their development, what does that indicate to you about any problem areas in terms of children relating factual events at that age?

A. Well, children who have a mental age of five years and chronological age of five years would have difficulty distinguishing fantasy from reality. The work of John Piaget, the great Swiss psychologist, indicates that children of five, on the average, are unable to distinguish things that they have thought about from things that they've actually encountered in a world of reality.

Children at the age of five years mentally have problems in retrieving memories, so memories that are once

stored have - are not consolidated, so to speak, are placed in abstract conceptual categories. The information may be (p. 742) there, it's just hard to retrieve it or bring it forth. And for these reasons children of this age level are very prone to respond to such things as leading questions. A question that implies information that was not actually the world of reality may become part of memory of a child, believes that that information fully occurred in the world of reality.

What I'm saying is that a child who was five years eight months chronologically, but has a mental age 15 months or so below that, will have even more severe problems in terms of retrieving memories and prone to be influenced by leading questions, will have problems distinguishing imagery, what they think about from the actual outside world.

Q. Do I understand you to be saying then, Dr. Thurber, that - correct me if I'm wrong, that were I to discuss with a child a particular action and event of that age that the child had not, in fact, experienced and discussed at some length, and asked the child to repeat it, that a child may have trouble distinguishing whether that actually happened to them or whether they've heard about it?

A. That's correct. It's especially the case in events that imply action. So if you describe for a four or five-year-old child some kind of an action-related behavior on the part of other people, the child has particular problems in distinguishing the discussion, the information (p. 743) presented verbally, from an actual experience and may confuse the two. And this comes from a lot of recent

research at New York University in regard to children and fantasy versus reality.

Q. Now, the child that confuses that, what they've heard with what actually has happened to them, and they recite what they've heard or report what they've heard, is that child lying in the normal sense that we understand it?

A. Absolutely not. Lying in the normal sense involves some kind of deception. To young children about the age of five on the average what is in their memory is true regardless of how that information got into the memory banks.

Q. If a child were to be reciting information that is true, even if it's not, in fact, happened something that they've heard and they've taken into their minds as being true, is that likely to affect how they react in the telling of it; their body positions, their outward acting, observations?

A. If a child is coming forth with what has been stored in memory, their nonverbal behaviors will be very consistent with that information. That is, they wouldn't be able to distinguish from what source the information was stored. So if we, for example, in research were to plant thoughts into the head of a young child and asked that child (p. 744) to rehearse what he has, or she has been told, the child will act as if this is true, both verbally and nonverbally.

Q. Let's go back to Dr. Eisenbeiss's evaluation. Did you have a chance to look over, and are you familiar with

the Children's Apperception Test and what's called the Plenk Story Telling test?

A. I'm familiar with the Children's Apperception. I've not heard of the Plenk test.

Q. Now, this Children's Apperception Test, could you describe for the jury just what that is and purports to test?

A. The test is composed of pictures of animals, some large, some small, several pictures of this type. And the child is asked to make up a story corresponding to the pictures. It's assumed that what is happening to the central figure in the child's story, the most prominent figure in the child's story, will be happening to the child himself or herself.

Q. And that is what they call a projective at the time by the child projecting its own feeling into the test?

A. That's correct.

Q. Assume if you would, please, the pattern of responses from that test, indicators if you will, these angry people being projected and some fear for physical safety. From that pattern alone is there any conclusion (p. 745) that can be drawn whether that child has been abused, or can accurately name its abuser?

A. First of all assuming that the interpretation is a reliable one, and the problem in the field of tests like the Childrens [sic] Apperception Test is that two clinical psychologists, or two psychiatrists who observe the same story will come up with different interpretations. But assuming that this is a reliable interpretation, no, that in

and of itself would not indicate a sexual abuse or physical abuse because there are so many possible other causes.

Q. Let's talk about the reliability of the Children's Apperception Test, the validity. Could you explain those two to the jury please?

A. Reliability has a number of meanings. With respect to the test such as the Children's Apperception Test, reliability refers to the degree of agreement among independent professionals. Typically you'll have ten or more clinical psychologists and psychiatrists who will read over the stories made in relation to the Children's Apperception stimuli and then each independently will interpret the stories, and then you assess the degree of agreement.

For example, how many of the ten agree that a certain story reflects aggression or hostility or sadness. And the findings indicate, at best, you can get something (p. 746) like a 60 percent agreement among judges. Another way of putting it is if you make decisions about people or about children based on the Children's Apperception Test, you'll make about 40 percent errors in your classifications, 40 percent errors.

Now, the validity refers to whether or not a test measured what it purports to measure. In other words, if the Children's Apperception Test does, in fact, measure a child's hostility this must be validated against known criteria. For example, does the child who gives you many aggressive stories, is that child also aggressive in the home and in the school? So you would validate the Children's Apperception Test against the behavioral ratings of aggression in the school. If the test measures what

it purports to measure you'd have a high relationship between real world aggression and aggression as found in the child's stories.

The validity of projected tests is notoriously low. Tests such as the Children's Apperception Test do not differentiate children of known behavioral disorders, that is to say you cannot give a group of children who have severe psychopathology, several disturbed children, from a group of normal children so-called on the basis of their Children's Apperception Test responses. So very low reliability, very low validities. In fact, according to the (p. 747) standards of American Psychological Association psychologists should not be making decisions about people based on tests such as the Children's Apperception Test with such low reliabilities and validities. The best you can get are some tentative hypotheses, nothing more.

Q. Now, you said you're unfamiliar with the Plenk Story Telling Test?

A. Yes, I am.

Q. If that test were widely used in your field of child psychology, clinical and child psychology, is it likely that you would be aware of it?

A. I would have to say yes. I have computer searches done monthly on tests that are available for clinical child psychologists. These are tests that have adequate levels of reliability and validity, and I do not recall having seen the Plenk Test show up on any of my computer searches.

The journals in my field, the scientific journals such as the Journal of Child Clinical Psychology have not

reported on this particular test. I'd have to say that it's not in the mainstream in child clinical psychology at this time.

Q. Okay. Let's talk a moment about gathering data from a child based on an interview with that child?

A. Yes.

(p. 748) Q. What are some of the pitfalls or dangers to be aware of to be sure that you're gathering accurate data from a child?

A. My first response is they are probably too numerous to mention. But, first and foremost, the examiner, the evaluator, the interrogator must be aware of personal biases and how those biases can be reflected in an interview situation. The primary consideration would be not to ask what are termed closed-ended questions, questions that can be asked - pardon me, questions that can be answered yes or no. It has been found that an interviewer's pre-existing assumptions and biases can be reflected in these questions and can guide children into the responses that the interviewer wants to see.

So we ask open-ended questions, questions that cannot be answered yes or no. It has also been found that interviewers can very subtly reward the responses they want to see, and can shape the answers of children. One of my colleagues in the Portland area, Bill McGeiver [sic] has found that simply by nodding the head and saying "um-hum" he can shape, so to speak, gradually shape behaviors in young children that border on the sexually bizarre, and these are children who have had no sexual

abuse in their background. Now these are also very young children, I might mention, from the four to six-year-old range.

(p. 749) So, an interviewer must be very, very aware that very subtle cues such as a nods [sic] or saying "um-hum" can reward young children, in effect, and can shape and determine the responses that the interviewer is going to see.

Attention, as such, is also a very important factor. If an interviewer has decided that a child has been sexually abused, for example, that interviewer will likely attend when the child responds in a way that is consistent with the assumptions, and will not attend if the child responds in a way that is contrary to the pre-existing assumption.

So, I think of the important issues here, the key ones are open ended questions, be aware of pre-existing biases, do not respond in subtle ways that might reward the responses that you want to see. We could go on and on. There are multitudinous problems in interviewing children.

One of my colleagues who - from whom I received training at the University of Oklahoma Medical School has recently published a book on the investigation and treatment of child abuse, and is probably the nation's authority at this time, C. Eugene Walker, and his position is that in initially approaching a child that presumably has been abused, that you use a very nonstructured kind of situation. You don't even ask questions. Bring the child (p. 750) in a room with many toys, many writing implements, papers. Let the child just behave spontaneously and see what comes of this kind of a situation without

attempting to prompt or influence the child by questions. And I would strongly support that approach because of the many possibilities of bias in terms of our questions.

Q. That sounds like a difficult task then to be certain not to inject anything into the interview.

A. Very much so.

Q. How can one guard – the best techniques for guarding against that so we can go back and determine whether an interviewer has skewed the information or injected their own feelings?

A. One consistent recommendation in the sexual abuse area is that on the initial interview by a professional, that the interview session itself be video taped. Thus other professionals independently can evaluate the quality of the interview techniques. That's the only way.

Q. Is an audio tape valuable?

A. In lieu of, or as a substitute for the video tape?

Q. Of course that won't reflect the nonvocal –

A. Correct. That would be the problem with it. So video tape is always recommended.

Q. All right. These interviewing techniques and (p. 751) skills. Are they likely to be learned in a weekend seminar fashion or –

A. Absolutely not. Any professional who works with children has to demonstrate actual supervised training, and this would be involved in a child clinical program or child psychiatry training program where you're

not only given formal classroom training but also supervised experiences by experts in the particular field. Now, these skills are not learned by workshops.

Q. Assume, if you would, please, a disclosure by a child of incestuous sexual abuse with emphasis on the fact that the perpetrator, or the assertion that the perpetrator is a father or stepfather and mother?

A. Yes.

Q. Assume initial disclosure to another parent involved in a custody battle as the initial disclosure?

A. Um-hum.

Q. Or at least initial discussions. Then please assume recitation of those discussions to doctors, and police personnel within a couple of days?

A. Yes.

Q. What is the likelihood in that scenario of non-leading or unbiased interviewing taking place?

A. I'd say a very low probability for an absence of bias. We're talking about individuals to begin with, a (p. 752) parent who would be unlikely to have training in this area, and that may have an ulterior motive, so to speak, for getting a particular response from the child. So I'd have to say a high probability of error.

Q. Assume then that same scenario, and that a therapist a Master's level therapist, I believe, interviewing. What should that therapist do in terms of their own knowledge about the facts of the case when they go into the interview with the child?

A. Well, preferably they would have no pre-existing knowledge, and that's the way of avoiding the bias. If the interviewer has pre-existing knowledge, then some of the issues of previously – I've discussed concerning the non-leading questions and the open-ended questions and preferably just a situation where you allow the child to behave spontaneously with the minimal of interaction with the interview – through the interviewer would be required here.

Q. What would the effect be of a child hearing a – an audio tape of its own recitation in terms of implanting that recitation in the child's memory?

A. Well, it's been found in work by Dent, 1983, that in interviewing children any kind of repetition, repeating the same question over and over again and listening to one's own answers via audio tape will, first of all, cause the (p. 753) child likely to say what you want to hear. It's another way of getting your biases reflected to a child's responses. So pushing the child with the same question over and over again will likely get the child to acquiesce, and acquiesce means to give you the response that would be consistent with your pre-existing biases. And certainly listening to an audio tape over and over again will thoroughly entrench the response. And, as I said earlier, with young children the likelihood is that that information heard and reheard on an audio player will become part of memory and will not be distinguishable in fact.

Q. The scenario that I've asked you to assume of initial discussion, or discussions, including a tape recording with a parent involved in a custody problem, subsequent disclosures to police and doctor personnel with

parents present, and then interviewing without the aid of video tape or audio tape and with the interviewer possibly, or probably having prior knowledge of the case. How would you evaluate the likelihood of any sort of reliable or accurate reporting in that scenario?

A. The likelihood would be exceedingly remote. Virtually all the errors that we've discussed would be in operation in such a scenario.

Q. Let's talk about interviewing in one other way. Assume, if you would, please, this scenario: Pediatrician (p.754) interviewing two-year-old child with the following questions "Do you play with daddy? Does daddy play with you? Do you ever touch daddy's pee-pee? Does daddy ever touch his pee-pee with you?"

How would you characterize that interview and those questions in terms of good procedure, responsible procedure that anyone should rely on?

A. All were closed-ended questions. And an inference I would make here is that the pediatrician would be in his or her office, probably wearing a white coat, which is more likely to evoke an acquiescence response; that is the child will answer in the way that the interviewer wants to hear.

Q. Now, getting away from interviewing a little bit and just credentials. Can a person with – an individual with a Master's in counseling and psychology from an education department and maybe a Ph.D. in counseling and psychology from an education department, can they ethically and legally call themselves a clinical psychologist?

MR. NAYLOR: Objection, foundation.

THE COURT: Sustain the objection until you establish further foundation.

Q. BY MR. HAYNES: Okay. Are you aware, sir, of what it takes to ethically call yourself a clinical psychologist?

(p. 755) A. Yes, I am.

Q. How are you aware of that?

A. I'm a member of the Division of Clinical Psychology of the American Psychological Association. I'm also aware of the guidelines for calling oneself a clinical psychologist as published in the American Psychologist, June of 1981.

Q. Are those the controlling guidelines for use of that term in a professional sense?

A. Yes, they are.

Q. Can one with the degrees that I mentioned ethically call oneself a clinical psychologist?

A. No, they cannot.

Q. Can one with the degrees that I mentioned ethically call oneself a child psychologist?

A. No, they cannot.

Q. When an interviewer or evaluator has their work independently tested or reviewed by an associate psychiatrist or psychologist is it likely that there's going to be some degree of difference between - over a long range of years? Does that question make any sense to you? It didn't to me. Let me try it again.

If an interviewer were to be engaged in a practice of interviewing children and gathering data from that, and conclusions from that over a significant number of (p. 756) years and frequently have that work checked by an associate psychologist, child psychologist or psychiatrist, is it likely for that person to be found never to be in error in their procedure and never to have a disagreement in conclusions?

A. I can't imagine that happening. I'd say you are more likely to get concordance or agreement with an individual with whom you're working, and when we have peer review we have other psychologists, clinical psychologists or psychiatrists who do not know the individual do the reviewing and evaluating. But, nonetheless, it's highly improbable that there would be no disagreement.

Q. Let's talk about a test from Dr. Eisenbeiss's report called the Parent Attachment Structured Interview. Are you aware of that particular test?

A. I wasn't familiar with it until I read it in the report.

Q. Again it is one of those that's likely to be - that you would likely be aware of if it was in the mainstream of use?

A. In my judgment, yes.

Q. From the report and the evaluation, did you glean or did you find out how that test was conducted and the results that it tested?

A. Well, I found out subsequently that it was a test (p. 757) where questions were asked and the child

responds by giving the name of an adult care giver. I didn't know about that prior to reading Dr. Eisenbeiss's report. And it seemed to me that the report placed a lot of weight, that is, Dr. Eisenbeiss's report placed a lot of weight on the result of that particular inventory.

Q. Okay. What effect would it have on the child in terms of who they're living with, with respect to how that child is going to report and answer those questions, in your opinion?

A. Well, the names of the care givers with whom the child lives are going to be in the forefront of memory and recall, and it would likely be evoked first, in my estimation.

Q. Okay. The failure of a child to name care givers both either positive or negative with whom the child is not living, does that seem indicative to you of a lack of bonding between that child and the noncustodial care givers?

A. I think the best interpretation would be the remoteness in the child's memory.

Q. Okay. Does the procedure, as you read it, and the results that you read make you feel confident in terms of a professional being able to give an opinion as to whether there is positive or negative bonding between a child and individuals?

(p. 758) A. It makes me feel very uncomfortable. I searched in vain for any reliability or validity information on this particular test. It could be that these - that this particular approach to assessment of attachment is completely unreliable. That happens in the field and without

any kind of research data we just don't know. This test could yield completely erroneous classifications absolutely error-filled, for all we know.

Q. Am I understanding you in saying then you're not asserting that the test itself is bunk, just that we don't know whether it's any good or not?

A. That's exactly right.

Q. All right. Can you rely on reliability and validity figures provided by the persons who manufacture and sell the test?

A. You can if they meet the standards of the American Psychological Association. These are very rigorous standards. But even so any kind of measuring instrument has to be kept under scrutiny because a test that might be reliable and valid at a given time period may lose reliability in time as society changes. So reliability and validities are changing phenomena and we have to keep scrutinizing them.

MR. HAYNES: Thank you. I have no other questions.

(p. 759) CROSS-EXAMINATION

BY MR. NAYLOR:

Q. Dr. Thurber, does your psychological license from the State of Idaho say "clinical psychologist" on it?

A. No. It's a generic license.

Q. Does it say "child psychologist" on it?

A. No, it does not.

Q. Does any of your degrees – strike that. I believe you've made that clear.

And it's true that Defense Counsel has hired you to come here to testify, is that true?

A. I'm not sure hire is the correct word.

Q. They obtained your services for which you intend to receive a fee?

A. To be honest, I don't know if I'm going to receive a fee.

Q. Okay.

A. Most often, by the way, I do not request a fee in these cases, sexual abuse, to avoid bias.

Q. That would be a good practice. And isn't it true that you spoke with Defense Counsel, what, just a week or two ago with your findings after reviewing Dr. Eisenbeiss's report?

A. About a week ago, yes. Less than a week.

Q. And isn't it true that you do not know, nor have (p. 760) you ever met Jeannie Wright?

A. That's correct.

Q. And you do not know or have never met Kathy Wright?

A. Correct.

Q. However, you do know that this case involved those two children, correct?

A. Yes, I do.

Q. And you've never given Jeannie any psychological evaluations of your own?

A. No, I have not.

Q. Nor Kathy?

A. No.

Q. Now, you indicated in the hypothetical scenario by Defense Counsel where the child relates to a parent, or person involved in a custody battle, there might be some personal bias in the first disclosure of sexual abuse?

A. Yes.

Q. Now, isn't it true that that same type of bias would not be present with other medical personnel, doctor, for example, who is not attempting to diagnose physical ailments?

A. I can't answer that.

Q. Nor with police officers who are involved in obtaining facts? Do you have any data to determine whether (p. 761) there would be personal bias there?

A. My reaction there is, if you don't mind just a very brief elaboration, that in the writings on sexual abuse found in some of the journals in the '70's and '80's are statements such as, "Children do not lie when they state they have been abused in any way." That has been discounted by subsequent research. But most – in my opinion most individuals who are on the front line professionally in interrogating children assume that if the child has made a revelation to a parent about sexual abuse, there can be no lie in the sexual abuse and that sex

abuse has taken place. So in that sense I think there might be a preexisting bias.

Q. Now, let's take that one step further, and let's say the issue here isn't that whether the child was actually abused and she's lying about that. Let's say that that is substantiated and that actually did occur?

A. Yes.

Q. Then is there any way to separate that first disclosure, where she said she had been sexually abused, with other details of it at disclosure and abuse of who did it, and what actually occurred? Is there any way to tell which are lies and which are truths?

A. Well, there are some ways, yes.

Q. And that would take some psychological valuation and testing?

(p. 762) A. Absolutely.

Q. All of which you had not done in this case?

A. Correct.

Q. And while we're talking about hypotheticals let's complete this one. Given the pediatrician again who is talking to a two-year-old, given the following questions: "Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?" Now, at that point in time you indicated, from your prior testimony, that those are closed-ended questions?

A. Correct.

Q. All right. Now, if that child then in response to "How does your father touch you with his pee-pee?" Is that a closed ended question?

A. No. That would be an open-ended question.

Q. That would be open, and at that point in time this two-year-old reflects, then responds voluntarily, "Daddy did this a lot more to my sister than he did to me." Would you find some kind of frequency, bias or leading type response at that point?

A. Two responses here. One is that I'd place credence on the child's elaboration if the child goes beyond the question itself and elaborates in some detail. But also have to say that an open-ended question that comes after a closed-ended question can still have bias. The closed-ended (p. 763) question will plant the thought, will plant the image and fantasy.

Q. Thank you. And do you believe that psychology is still in its developmental stages?

A. Excuse me for trying to define developmental because that has a particular meaning to me. I'd say psychology is in much the same position that established sciences such as physics and chemistry were in about 100 years ago. I'd also say that in the field of sexual abuse it's only been the last two years that we've had anything in the way of data base. So, as far as that area is concerned, yes, in the extreme immature developmental stage.

Q. And do you believe that psychology is an exact science?

A. I'll have - if you don't mind "exact" what does that mean?

Q. A hard science, physics, math with absolutes?

A. I'd have to respond to that by saying that according to the National Science Foundation, psychology has the most rigorous methodologies as any science. In that sense I'd classify it as a very hard science, it has to be that way because our subject matter is so complicated.

MR. NAYLOR: Thank you, doctor.

MR. HAYNES: Nothing on redirect.

THE COURT: You may step down.
